Supreme Court, U.S.
FILED
FEB 28 1992
OFFICE OF THE CLERK

91-1390

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NEIL T. PROTO*
JAMES F. HIBEY
FRANCES C. DELAURENTIS
MARIE L. MILLER
ERIC T. WERNER
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHTD.
901 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

**Counsel of Record*
Attorneys for Petitioner
West Farm Associates

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether *Hewitt v. Helms*, 459 U.S. 460 (1983), and related cases direct the conclusion that Section 22a-19(b) of the Connecticut Environmental Protection Act of 1971 (CEPA), CONN. GEN. STAT. ANN. §§ 22a-14—22a-20 (West 1985)—which establishes in mandatory terms the responsibilities of Connecticut administrative agencies with respect to the approval of projects threatening unreasonable pollution, impairment or destruction to public trust resources—creates in intervenors acting pursuant to Section 22a-19(b) a property interest protected by the Fourteenth Amendment Due Process clause.

II. Whether the jurisprudential tradition rooted in the "case or controversy" requirement of Article III of the United States Constitution constrains the ability of the federal courts to give full force and effect to the enforcement powers vested in private citizens by state environmental statutes that are based on the Public Trust Doctrine.

PARTIES TO THE PROCEEDING

The petitioner is West Farms Associates, plaintiff and appellant in the courts below. The respondents are the State Traffic Commission of the State of Connecticut, Emil H. Frankel and J. William Burns, individually and as a member of the State Traffic Commission of the State of Connecticut, Nicholas A Cioffi and Bernard R. Sullivan, individually and as a member of the State Traffic Commission of the State of Connecticut, Louis S. Goldberg and Lawrence F. DelPonte, individually and as a member of the State Traffic Commission of the State of Connecticut, Department of Transportation of the State of Connecticut, and Wilmorite, Inc., defendants and appellees in the courts below.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
A. The Statutory Scheme	2
B. Facts of the Case	6
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	20
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	34a
APPENDIX D	35a
APPENDIX E	45a

TABLE OF AUTHORITIES

Cases:	Page
BAM Historic District Association v. Koch, 723 F.2d 233 (2d Cir. 1983)	9
Board of Pardons v. Allen, 482 U.S. 369 (1987)	11,12
California Trout, Inc. v. State Water Resources Control Board, 207 Cal. App. 3d 585, 255 Cal. Rptr. 184 (1989)	16
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	4,15
City of Columbia v. Omni Outdoor Advertising, ___ U.S. ___, 111 S. Ct. 1344 (1991)	20
Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council, 215 Conn. 474, 576 A.2d 510 (1990)	8,14
Double I Limited Partnership v. Plan and Zoning Commission, 218 Conn. 65, 588 A.2d 624 (1991)	11
Flast v. Cohen, 392 U.S. 83 (1968)	18,19
Ford v. Wainwright, 477 U.S. 399 (1986)	11
Fusco v. Connecticut, 815 F.2d 201 (2d Cir.), *cert. denied*, 484 U.S. 849 (1987)	9
Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)	11,12
Gregory v. Town of Pittsfield, 470 U.S. 1018 (1985)	11
Hewitt v. Helms, 459 U.S. 460 (1983)	2,9,11,13-15
Housatonic River v. General Electric, 462 F. Supp. 710 (D. Conn. 1978)	3,17-19
Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)	2,15,16
Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989)	11,12

Table of Authorities Continued

	Page
Light Rigging Co. v. Department of Public Utility Control, 219 Conn. 168, 592 A.2d 386 (1991)	19
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	10,17
Manchester Environmental Coalition v. Stockton, 184 Conn. 51, 441 A.2d 68 (1981)	*passim*
Olim v. Wakinekona, 461 U.S. 238 (1983)	11
PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir.), *cert. granted in part*, ___ U.S. ___, 112 S.Ct. 414 (1991)	11,20
Sierra Club v. Morton, 405 U.S. 727 (1972)	19
United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973)	18
Vitek v. Jones, 445 U.S. 480 (1980)	11
Warth v. Seldin, 422 U.S. 490 (1975)	18
Constitutions, statutes and regulations:	
U.S. CONST. art. III	3,18
U.S. CONST. amend. XIV, § 1	2,11,20
CAL. CONST. art. 1, § 25 (1980)	5
COLO. CONST. art. 16, § 5 (1980)	6
FLA. CONST. art. 10, § 11 (West 1992)	6
N.C. CONST. art. 14, § 5 (1984)	6
PA. CONST. art. 1, § 27	6,16
28 U.S.C. § 1254(1) (1988)	1
42 U.S.C. § 1983 (1981)	8,20
CAL. PUB. RES. CODE § 21000 (Deering 1986)	5
CONN. GEN. STAT. ANN. § 14-298 (West 1987 & Supp. 1991)	6

Table of Authorities Continued

	Page
CONN. GEN. STAT. ANN. § 14-311 (West 1987 & Supp. 1991)	6
CONN. GEN. STAT. ANN. § 14-311(a) (West 1987 & Supp. 1991)	6
The Connecticut Environmental Protection Act, CONN. GEN. STAT. ANN. §§ 22a-14—22a-20 (West 1985):	
CONN. GEN. STAT. ANN. § 22a-15	2,3,17
CONN. GEN. STAT. ANN. § 22a-16	3
CONN. GEN. STAT. ANN. § 22a-17	5,14,15
CONN. GEN. STAT. ANN. § 22a-17(a)	4
CONN. GEN. STAT. ANN. § 22a-18(b)	5,17
CONN. GEN. STAT. ANN. § 22a-18(c)	5
CONN. GEN. STAT. ANN. § 22a-19	*passim*
CONN. GEN. STAT. ANN. § 22a-19(a)	4
CONN. GEN. STAT. ANN. § 22a-19(b)	*passim*
LA. CIV. CODE ANN. art. 449, 450, 452 (West 1980)	6
ME. REV. STAT. ANN. Tit. 12 § 571 (Supp. 1991)	6
MICH. COMP. LAWS ANN. § 691.1201 *et seq.* (West 1987)	5
N.D. CENT. CODE § 61-01-01 (Supp. 1991)	6
N.J. STAT. ANN. § 13-9B-2 (West 1991)	6
N.M. STAT. ANN. § 72-1-1 (1985)	6
OR. REV. STAT. § 196.805 (Supp. 1990)	6
S.D. CODIFIED LAWS ANN. Tit. 34A-10-5-8 (1986)	5
WASH. REV. CODE § 43.21C.020 (1982)	5
Miscellaneous:	
14 H.R. (Conn.) Proc., 1971 Sess., pt. 2	2,3
14 S. (Conn.) Proc., 1971 Sess., pt. 3	2

Table of Authorities Continued

	Page
Minutes Special Meeting, State Traffic Commission, September 5, 1991	10,14
In re: Proposed Plainville Mall, STC No. 109-8903-01, West Farms Associates Verified Petition for Designation as a Party and Notice of Intervention (filed December 1, 1989)	7
Fed. R. Civ. P. 12(b)(6)	8
Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)	16
Note, *The Emergence of the Public Trust Doctrine as a Public Right to Environmental Preservation in South Dakota*, 29 S.D.L. REV. 496 (1984)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

West Farms Associates respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a) will be reported at 951 F.2d 469. The decision of the district court (App., *infra*, 11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution and Section 22a-19 of the Connecticut Environmental Protection Act, CONN. GEN. STAT. ANN. § 22a-19 (West 1985), are reproduced in relevant part at App., *infra*, 34a.

STATEMENT

This case raises the question whether a private party invoking the mandatory duty imposed upon an agency under a state law codifying the Public Trust Doctrine has a property interest in the fulfillment of that duty under the Fourteenth Amendment to the United States Constitution and the reasoning of *Hewitt v. Helms*, 459 U.S. 460 (1983). Embodied within this question is the ancillary question: whether the federal judiciary, acting within the constraints of Article III's "case or controversy" requirement, is without an appropriate jurisprudential framework for recognizing such an alleged state-granted property interest.

A. The Statutory Scheme

1.a. The Connecticut Environmental Protection Act of 1971 ("CEPA" or "the Act"), CONN. GEN. STAT. ANN. §§ 22a-14—22a-20 (West 1985), expressly declares that "there is a public trust in the air, water and other natural resources of the state of Connecticut and that *each person is entitled* to the protection, preservation and enhancement of the same." CONN. GEN. STAT. ANN. § 22a-15 (West 1985) (emphasis added). Prior to this affirmative invocation of entitlement, Connecticut did not recognize the Public Trust Doctrine. 14 H.R. (Conn.) Proc., 1971 Sess., pt. 2, at 739, 741 (comments of Rep. Papandrea); 14 S. (Conn.) Proc., 1971 Sess., pt. 3, at 1091-93 (comments of Sen. Pac and Sen. Eddy); *see also generally Illinois C. R. v. Illinois*, 146 U.S. 387 (1892). The Act enlarges the rights of the

individual citizens of Connecticut to protect public trust resources from conduct that may cause unreasonable pollution, impairment or destruction. 14 H.R. (Conn.) Proc., 1971 Sess., pt. 2, at 739 (comments of Rep. Papandrea).

1.b. CEPA creates "both substantive and procedural rights." *Manchester Envtl. Coalition v. Stockton*, 184 Conn. 51, * * *, 441 A.2d 68, 73 (1981). It manifests the Connecticut Legislature's intention "*to provide all persons with an adequate remedy* to protect" public trust resources. CONN. GEN. STAT. ANN. § 22a-15 (West 1985) (emphasis added); *see also Housatonic River v. General Elec.*, 462 F. Supp. 710, 712 (D. Conn. 1978). In order to accomplish its purpose, CEPA creates a private cause of action for declaratory and equitable relief against unreasonable pollution. CONN. GEN. STAT. ANN. § 22a-16 (West 1985). Section 22a-16 *automatically* confers standing upon "any person, partnership, . . . or other legal entity," including West Farms Associates, a Connecticut partnership, to sue private defendants, "the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof" in order to protect the public trust. *Id.*; *Manchester Envtl. Coalition*, 441 A.2d at 73-74.[1]

2.a. CEPA's entitlement to standing for those persons invoking it is not limited to post-decision judicial recourse. It provides that entities, such as West Farms Associates, may intervene in a state licensing proceeding and invoke CEPA's duties. Section 22a-19 of CEPA authorizes "*any* person, partnership . . . or other legal entity" to intervene "[i]n *any* administrative, licensing or other proceeding . . . on the filing of a verified pleading asserting that the proceeding . . . involves conduct which has, or which is reasonably likely to have, the effect of" harming the public

[1] The Connecticut Constitution does not have a "case or controversy" requirement comparable to the United States Constitution, Art. III. See *Housatonic River v. General Elec.*, 462 F. Supp. 710, 713 n.7 (D. Conn. 1978).

trust in particular resources. CONN. GEN. STAT. ANN. § 22a-19(a) (West 1985) (emphasis added). Subparagraph (b) of this section imposes on a state agency a substantive duty, and a prohibition, that can be invoked by an intervenor. It provides that:

> . . . the agency *shall* consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and *no conduct shall be authorized or approved* which does, or is reasonably likely to, have such effect so long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

Id. § 22a-19(b) (emphasis added). Thus, the section prohibits the agency from authorizing conduct that is even reasonably likely to result in unreasonable pollution, impairment or destruction unless the agency first makes a substantive finding that no "feasible and prudent alternative" exists. *Id.*[2]

An intervenor's rights are further buttressed by the shifting of the burden of production; placing upon the intervenor *only* the initial burden to establish a *prima facie* case that the state's or licensees' conduct, alone or combined with others, "has, or is reasonably likely unreasonably to" cause harm. CONN. GEN. STAT. ANN. § 22a-17(a)

---

[2] The Connecticut Supreme Court construes the phrase "feasible and prudent alternative," according to the definition employed in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), and gives little discretion to the administrative agency or reviewing court. *Manchester Envtl. Coalition*, 441 A.2d at 75-76. Thus, the mandatory duty imposed on defendants presents "a plain and explicit bar" to any conduct unless the required finding is made: "only the most unusual situations are exempted." *Citizens to Preserve Overton Park*, 401 U.S. at 411; *Manchester Envtl. Coalition*, 441 A.2d at 76.

(West 1985); *Manchester Envtl. Coalition*, 441 A.2d at 74. The burden necessary to make a *prima facie* case under Section 22a-17 is modest.[3]

2.b. CEPA further affirms the mandatory duty on state agencies by giving the court authority to remand actions for equitable or declaratory relief to such agencies, CONN. GEN. STAT. ANN. § 22a-18(b) (West 1985), and directs that the court "shall retain jurisdiction of the action pending completion of the administrative action *for the purpose of determining whether adequate consideration by the agency has been given to the protection of the public trust* . . . ." *Id.* (emphasis added). Moreover, the Act provides that "[i]f the agency's consideration has not been adequate, . . . *the court shall adjudicate* the impact of the defendant's conduct on the public trust . . . in accordance with sections 22a-14 to 22a-20, inclusive." *Id.* § 22a-18(c).[4]

---

[3] In *Manchester Envtl. Coalition v. Stockton*, 441 A.2d 68 (1981), the plaintiffs challenged the approval by the state Commissioner of Commerce of a project plan for a proposed Manchester industrial park. *Id.* at 72. Specifically, the plaintiffs "sought to enjoin 'unreasonable pollution, impairment or destruction' of the air which would result from the automobile traffic generated by the expected employment at the industrial site of 2000 full-time and 600 part-time workers." *Id.* at 73 (footnote omitted). The Supreme Court of Connecticut found that this allegation established the plaintiffs' *prima facie* case "by showing a protectable natural resource (air) and that the action of the defendants would impair this resource." *Id.* at 74.

[4] Connecticut is among several states that have recognized individual rights in public trust resources and have imposed a mandatory duty and substantive predicates on the conduct of state agencies. In Michigan and South Dakota, administrative agencies *shall* not authorize conduct which is likely to impair or destroy the air, water or other natural resource because of the public trust imposed on such resources. South Dakota, S.D. CODIFIED LAWS ANN. Tit. 34A-10-5-8 (1986); Michigan, MICH. COMP. LAWS ANN. § 691.1201 *et seq.* (West 1987). Other states have enacted public trust statutes which generally protect natural resources. California: CAL. CONST. art. 1, § 25 (1980) and CAL. PUB. RES. CODE § 21000 (Deering 1986); Washington: WASH. REV. CODE § 43.21C.020 (West 1982). The following states also recognize some

B. Facts of the Case

1.a. In relevant part, Section 14-311 of the Connecticut General Statutes provides that "[n]o person, firm, [or] corporation . . . shall build . . . or operate any . . . shopping center . . . generating large volumes of traffic, having an exit or entrance on, or abutting or adjoining, any state highway or substantially affecting state highway traffic within this state until such person . . . has procured from the State Traffic Commission a certificate that the operation thereof will not imperil the safety of the public." CONN. GEN. STAT. ANN. § 14-311(a) (West 1987 & Supp. 1991).

Respondent Wilmorite, Inc. ("Wilmorite") is a New York real estate development corporation proposing to construct of a 1.3 million square foot shopping mall in Plainville, Connecticut. The proposed mall will generate 40,000 to 50,000 new motor vehicle trips a day. Pursuant to Section 14-311(a), Wilmorite in late March, 1989, applied to the respondent State Traffic Commission ("STC")[5] for a Certificate authorizing it to make certain changes to state and federal roadways (Interstate 84) necessary for the operation of the proposed mall.

---

form of public trust in the stated natural resources. Colorado: COLO. CONST. art. 16, § 5 (1980) (water of streams); Florida: FLA. CONST. art. 10, § 11 (West 1992) (land under navigable waters); Louisiana: LA. CIV. CODE ANN. art. 449, 450, 452 (West 1980) (water and shores); Maine: ME. REV. STAT. ANN. Tit. 12 § 571 (Supp. 1991) (public trust in intertidal land); New Jersey: N.J. STAT. ANN. § 13-9B-2 (West 1991) (freshwater wetlands); New Mexico: N.M. STAT. ANN. § 72-1-1 (1985) (natural waters); North Carolina: N.C. CONST. art. 14, § 5 (1984) (conservation of natural resources); North Dakota: N.D. CENT. CODE § 61-01-01 (Supp. 1991) (water); Oregon: OR. REV. STAT. § 196.805 (Supp. 1990) (wetlands and rivers). *See also* PA. CONST. art. 1, § 27.

[5] The STC is a public regulatory licensing agency composed of three member commissioners: the Commissioner of the state Department of Transportation (DOT), the Commissioner of Public Safety, and the Commissioner of Motor Vehicles. CONN. GEN. STAT. ANN. § 14-298 (West 1987 & Supp. 1991).

1.b. Petitioner, West Farms Associates ("West Farms") is a Connecticut partnership and the owner of West Farms Mall in West Hartford, Connecticut. It is located six miles from the site of the proposed Plainville Mall. West Farms holds two STC Certificates relating to its operation of the West Farms Mall.

Concerned about the risk to the health and safety of its employees and patrons that would likely result from the increased air pollution and traffic congestion Wilmorite's proposed changes would produce on Interstate 84, as well as its own environmental and legal duties as a Certificate holder, traffic generator, and corporate citizen, West Farms petitioned to intervene in the STC's certification proceeding on December 1, 1989 pursuant to, among other bases, Section 22a-19 of CEPA. West Farms set forth its *prima facie* case in its verified petition for intervention. West Farms' petition alleged harm to the air and other resources as a consequence of Wilmorite's proposed conduct; identified alternatives to the proposal; and specifically invoked the duties set forth in subparagraph (b) of Section 22a-19. Additionally, the intervention petition noted the particularized environmental effects Wilmorite's proposal would have on West Farms itself. *See In re: Proposed Plainville Mall*, STC No. 109-8903-01, West Farms Associates Verified Petition for Designation as a Party and Notice of Intervention (filed December 1, 1989) at App., *infra*, 35a, 38a-40a.

1.c. Without notice to West Farms, the STC held a meeting on December 19, 1989. On January 11, 1990, the STC notified West Farms that it had granted West Farms' Section 22a-19 petition "*solely* for the purpose of raising environmental issues relevant to the issuance of a Certificate under Section 14-311 of the General Statutes."

2. After West Farms' formal intervention in the proceeding, the STC through its employees and others held *ex parte* meetings with Wilmorite to discuss and to make

decisions concerning substantive aspects of its Certificate proposal, including environmental decisions. The STC failed to notify West Farms of these meetings; provided no opportunity for West Farms to participate in them despite providing such an opportunity to non-intervenors; and provided no transcripts, status reports or meeting notes to indicate what had transpired at these meetings or what decisions had been reached.

3. Concerned that the STC was conducting its decision-making process in complete disregard of West Farms' rights as an intervenor and its own substantive duties under CEPA, West Farms brought an action seeking declaratory and injunctive relief in federal district court on April 9, 1990. West Farms' Complaint named the STC and Wilmorite as defendants, and advanced several grounds for relief including a claim that the STC's conduct had violated West Farms' right to due process under the Fourteenth Amendment and 42 U.S.C. § 1983. On this claim, West Farms' asserted property interests in, among other things, its rights under Section 22a-19, including those contained in subparagraph (b).

4. The District Court granted defendants' motion to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and rejected West Farms' due process claim, concluding that neither the terms of Section 22a-19 nor the CEPA generally, created a constitutionally-protected property interest for West Farms. Specifically, the court cited *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council*, 215 Conn. 474, 576 A.2d 510 (1990), and observed that the Connecticut Supreme Court "reserved for another occasion the question of 'the extent to which the act would confer such property rights in the absence of a showing of any specific personal or legal interest in the subject matter of the proceedings at issue.' *Id.* at 484, n.5[, 576 A.2d at 515 n.5.]" App., *infra*, 24a. Without further analysis, the District Court concluded that "[i]n light of the holding of the Connecticut Supreme

Court in *Sterling*, this court cannot agree with West Farms that the Connecticut Supreme Court has held that the [Environmental] Protection Act confers upon West Farms a property interest entitled to Fourteenth Amendment Protection." *Id.*

5. On review, the United States Court of Appeals for the Second Circuit affirmed. Although the Court of Appeals quoted the relevant text from Section 22a-19(b) of CEPA, see App., *infra*, 6a, it disagreed that this language imposed anything more than a procedural obligation on the STC. The Court found that:

> Section 22a-19 accords to an intervenor such as West Farms an opportunity to present to the STC the intervenor's views as to the effect on the environment of the development in question. The STC has no obligation to accept as true the intervenor's allegations *but is free to take whatever action it believes prudent*. Such a right is purely procedural, providing at best an opportunity to be heard.

West Farms Associates v. State Traffic Commission, No. 91-7460, slip op. at 7 (2d Cir. Dec. 3, 1991) (emphasis added) [hereinafter *West Farms Associates*, App., *infra*, 1a, 6a]. The court cited *Fusco v. Connecticut*, 815 F.2d 201, 205-06 (2d Cir.), *cert. denied*, 484 U.S. 849 (1987), and *BAM Historic District Association v. Koch*, 723 F.2d 233, 236 (2d Cir. 1983), for the proposition that mere procedural rights do not give rise to a protected property interest.

The court distinguished the instant case from *Hewitt v. Helms*, 459 U.S. 460 (1983). It observed that the statute in *Hewitt* "imposed mandatory duties on Pennsylvania prison officials for the benefit of individual inmates." *West Farms Associates*, App., *infra*, at 6a. By contrast, the court determined, Section 22a-19(b) "neither specifie[d] any particular action or non-action nor confer[red] any indivi-

dualized benefit . . . [also] the STC's decision is largely of a judgmental and discretionary nature." *Id.* The court placed considerable significance on its finding that the benefits of Section 22a-19 inured to a general class rather than to a specific individual. The court cited *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), for its conclusion that "[s]uch universal benefits are not property interests protected by the Due Process Clause." *West Farms Associates*, App., *infra*, at 7a.[6]

6. On September 5, 1991, about three weeks prior to oral argument in the court of appeals, the STC held a special meeting to consider Wilmorite's Certificate application. On several occasions during the meeting, West Farms' counsel attempted to introduce evidence, beyond its verified pleading, of the harmful air pollution that would be generated by 40,000 to 50,000 additional motor vehicles trips a day and its health effects as well as the environmental harm to the land at the site of the proposed roadway changes, and the effects of the proposed changes on nearby wetlands. *See Minutes Special Meeting, State Traffic Commission*, September 5, 1991, App., *infra*, 45a, 48a-49a. The Commission refused to admit the proffered evidence. *Id.* No evidence was introduced to refute or contradict West Farms verified pleadings. At the conclusion of the meeting, the STC approved Wilmorite's request and voted to issue the Certificate without considering West Farms' verified pleadings concerning public trust resources. *Id.* at 50a.[7]

---

[6] The court further stated: "It may be that West Farms Mall will lose business if Wilmorite is permitted to build Plainville Mall. However, Connecticut has not established protection from competition as a property right." *West Farms Associates*, App., *infra*, at 7a-8a.

[7] The procedural and substantive illegalities alleged by West Farms in its Complaint (see *supra*, Facts of the Case, paragraphs 1c, 2), including secretive meetings between the state and the applicant during which decisions were made, are similar to those alleged in *PFZ Prop-*

REASONS FOR GRANTING THE PETITION

1. Under settled legal principles, state statutes that employ "language of an unmistakably mandatory character" and impose substantive predicates to state action may create liberty or property interests protected by the Fourteenth Amendment. *Hewitt v. Helms*, 459 U.S. 460, 470-72 (1983); *see also Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989); *Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J. concurring in part, dissenting in part); *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1021 (1985) (O'Connor, J., dissenting from denial of certiorari); *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Vitek v. Jones*, 445 U.S. 480, 488-91 (1980); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 10 (1979) [hereinafter *Greenholtz v. Nebraska Penal Inmates*]; *Double I Ltd. Partnership v. Plan and Zoning Comm'n*, 218 Conn. 65, 78, 588 A.2d 624, 631 (1991).

In *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court addressed a claim by a Pennsylvania prisoner that prison officials had violated his Fourteenth Amendment right to due process by confining him in administrative segregation. The Court held that the Due Process Clause did not independently create an interest in being held in a general population cell, 459 U.S. at 470; however, Justice Rehnquist, writing for the Court, concluded that the inmate had acquired such a liberty interest by virtue of the Pennsylvania statutes governing administrative custody of prisoners. *Id.* at 470-71. The Court emphasized that the statutes at issue, using mandatory terms comparable to CEPA, directed that the specified procedures "shall," "must," or "will" be employed and provided "that administrative segregation will not occur absent specified substantive predicates . . . ." *Id.* at 471-72. A similar sub-

---

erties, Inc. v. Rodriguez, 928 F.2d 28, 29-30 (1st Cir.), *cert. granted in part*, ___ U.S. ___, 112 S. Ct. 414 (1991) (oral argument held on February 26, 1992).

stantive predicate (*i.e.*, "no conduct shall be authorized . . . so long as . . . ") also proscribes the conduct of state officials under CEPA.

In *Board of Pardons v. Allen*, 482 U.S. 369 (1987), the Court amplified the *Hewitt* principle. *Id.* at 381. Relying on its decision in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), the Court through Justice Brennan determined that "[s]ignificantly, the Montana statute, like the Nebraska statute, uses mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." *Id.* at 377-78, 379.[8] In CEPA, there is a clear presumption that environmentally harmful conduct "shall not be authorized"; and, although some subjective judgment is involved concerning the nature and effect of alternatives, CEPA "act[s] to limit meaningfully the discretion of the decisionmakers." *Id.* at 382 (O'Connor, J., dissenting); *see also Manchester Envtl. Coalition v. Stockton*, 441 A.2d at 76.

2. CEPA imposes other duties and substantive predicates on agency conduct. The right to intervene and "standing to sue" for those seeking declaratory or injunctive relief is automatic: the agency is without discretion to deny such a status. The initial burden for setting forth a *prima facie* case that unreasonable pollution exists is modest; the burden then shifts to the state and the project's proponent. CEPA's "substantive limitations on official discretion," *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989), exceed those recognized by this Court as creating a protected interest under the Fourteenth Amendment.

---

[8] The Court specifically refused to recognize any difference between statutory language mandating release "unless" the parole board made certain findings and similar language mandating release "when," "if," or "subject to" the making of the findings. *Id.* at 378. The language used in CEPA ("so long as") is similar.

3. The decision of the Second Circuit departs from these settled legal principles in holding that Section 22a-19(b) does not afford Petitioner West Farms a protected property interest. It flatly conflicts with this Court's ruling in *Hewitt v. Helms*, 459 U.S. 460 (1983), and related cases. CEPA generally, and Section 22a-19(b) specifically, possess all the textual attributes identified by the Court as necessary to create a protected property interest. Accordingly, review by the Court is necessary to correct the conflict and to clarify the contours of the *Hewitt* rule and its proper application to state Public Trust statutes such as CEPA. *See* discussion, *supra*, at 5 n.4.

4. The court of appeals erred in two distinct ways. First, it erroneously interpreted Section 22a-19(b) as conferring unrestricted discretion upon the STC's decision-making authority, stating that CEPA "neither specifies any particular action or non-action .... [T]he STC's decision is largely of a judgmental and discretionary nature." *West Farms Associates*, App., *infra*, at 6a. Second, the court held that West Farms derived no individualized benefit from its invocation of Section 22a-19, concluding that CEPA does not "confer[ ] any individualized benefit;" rather, "the intended beneficiaries of Section 22a-19(b) are entirely generalized, ... Such universal benefits are not property interests protected by the Due Process Clause." *Id.* at 6a-7a.

5.a. The text of Section 22a-19, and of CEPA generally, provides substantive predicates curbing the STC's decision-making discretion. Contrary to the lower court's opinion, the statute specifies both particular action and particular non-action.

5.b. Section 22a-19(b) expressly directs that "the agency *shall* consider the alleged unreasonable pollution, impairment or destruction of the public trust[.]" CONN. GEN. STAT. ANN. § 22a-19(b) (emphasis added). *Cf. Hewitt v. Helms*, 459 U.S. at 471. This consideration is not merely

procedural, but is predicated upon the burden shifting principle incorporated into CEPA by Section 22a-17, and the court was required to read this coordinate element of CEPA together with Section 22a-19 when construing the statute. *See Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council*, 215 Conn. 474, 482-83, 576 A.2d 510, 515 (1990).

Under the Act, the intervenor does not hold a mere expectancy but is affirmatively *entitled* to present fully his *prima facie* case thereby shifting the burden of production to the proponent and, further, obligating the agency to evaluate adequately any rebuttal evidence the proponent may be able to offer. *Cf. Hewitt v. Helms*, 459 U.S. at 470 n.6. Thus, the court of appeals erred in its conclusion that "[t]he STC has no obligation to accept as true the intervenor's allegations but is free to take whatever action it believes prudent." *West Farms Associates*, App., *infra*, at 6a. The burden shifting envisioned by the statute plainly does not permit an administrative agency acting pursuant to CEPA, and particularly Section 22a-19(b), wholly to disregard an intervenor's claims. Rather, it entitles the intervenor to a presumption that its allegations are true unless rebutted. *See Manchester Envtl. Coalition v. Stockton*, 441 A.2d 68, 74 (1981).[9]

5.c. Moreover, contrary to the court of appeals opinion, the second clause of Section 22a-19(b) explicitly specifies a particular non-action. "[*N*]*o conduct* [reasonably likely to pollute, impair, or destroy trust resources] *shall be authorized or approved*" where a "feasible and prudent alternative" exists. CONN. GEN. STAT. ANN. § 22a-19(b)

---

[9] West Farms established its *prima facie* case in its intervention petition. Based upon West Farms' verified pleadings, the STC granted its petition. The record is devoid of any rebuttal evidence in favor of Wilmorite's proposal. *See Minutes Special Meeting, State Traffic Commission*, September 5, 1991, App., *infra*, at 45a. Accordingly, the STC was compelled to find that Wilmorite's plan would, or would reasonably be likely to, result in the alleged harm.

(emphasis added). This language plainly indicates that, if the proponent offers nothing to rebut the *prima facie* case, the agency (here, the STC) is without authority to approve the conduct. *See also* CONN. GEN. STAT. ANN. § 22a-17. Such a requirement also substantively predicates the agency's determination of whether the proponent has proved his affirmative defense. *Hewitt v. Helms*, 459 U.S. at 472 ("administrative segregation will not occur absent specified substantive predicates . . ."). More than the Secretary of Transportation in *Citizens to Preserve Overton Park*, the STC faces a "plain and explicit bar" to approval of such conduct except in the most unusual circumstances. *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 411 (1971); *Manchester Envtl. Coalition*, 441 A.2d at 75-76.

6.a. An additional predicate to STC action emerges from the Public Trust Doctrine (the "Doctrine") and the specific provisions of CEPA which together affirm the textual mandatory duty. The meaning of the Doctrine, which undergirds and permeates CEPA as well as other states' statutes and common law, as it relates to individual property rights was also overlooked by the court of appeals. The court's reasoning reflects a lack of proper respect for the contours of the Doctrine as it has evolved under state law and warrants review by this Court.

This Court articulated the principle of the Public Trust in its relationship to American jurisprudence as far back as 1892. In *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), the Court considered whether the Illinois legislature could repeal an earlier statute which conveyed huge portions of the bed of Lake Michigan to the Illinois Central Railroad, without offending the federal constitution. In upholding the repeal, Justice Field, writing for the Court, stated that "the state holds the title to the lands . . . in the same manner that the state holds title to soils under the water, by the common law we have already shown . . . It is a *title held in trust for the people of the state*, that they may enjoy the navigation of the

waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Illinois C. R.*, 146 U.S. at 452 (emphasis added). The Court determined that the state's role as trustee over property of common public interest was akin to its "police powers in the administration of government and the preservation of the peace," and the former could no more be abdicated than the latter. *Id.*

6.b. State legislatures have relied on such state power and responsibility and the principle that the public trust in natural resources is in the nature of a state "property". *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, * * * , 255 Cal. Rptr. 184, 212 (1989). *See also* Pa. Const. art. 1, § 27 and the statutes cited, *supra*, at 5 n.4. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970). State legislatures may choose to mandate that *individual* citizens have a right to protect such "property," *California Trout*, 255 Cal. Rptr. 184, and may compel executive agencies to meet substantive predicates before authorizing conduct that may adversely affect such natural resources. Connecticut, Michigan and South Dakota have so chosen. *See supra*, at 5 n.4. As one commentator noted:

> [T]he public trust doctrine may truly provide the needed conceptual foundation for the proposition that simply by virtue of our status as members of the public, we have rights in the environment *on par with traditional private property rights.*

Note, *The Emergence of the Public Trust Doctrine as a Public Right to Environmental Preservation in South Dakota*, 29 S.D.L. REV. 496, 496 (1984) (emphasis added).

The Connecticut Legislature's formal invocation of the Public Trust Doctrine mandating that state agencies responsibly discharge their duty to insure the protection of

natural resources, CONN. GEN. STAT. ANN. §§ 22a-18(b), 22a-19(b), establishes *the* mechanism to insure their protection: the statutory right of private parties to invoke such mandatory duties and to require that substantive predicates be met without which harmful conduct may not occur. "In passing CEPA, the Connecticut legislature meant to reinforce the administrative resources devoted to environmental protection by enlisting the aid of concerned citizenry." *Housatonic River v. General Elec.*, 462 F. Supp. 710, 712 (D. Conn. 1978).

7. The court of appeals also erred in finding that Section 22a-19(b) conferred no individualized benefit to West Farms. *West Farms Associates*, App., *infra*, at 6a-7a (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) for the proposition that "[t]he hallmark of property, . . . is an individual entitlement grounded in state law."). Such a conclusion flatly conflicts with the Connecticut Legislature's determination, pursuant to the Public Trust Doctrine, to confer "standing" on individuals, such as West Farms, when they seek to assure their own "entitle[ment] to the protection, preservation and enhancement," of particular public trust resources, CONN. GEN. STAT. ANN. § 22a-15. The Legislature also has conferred upon West Farms a statutory entitlement to intervene in agency proceedings; to invoke a mandatory duty on state agencies that imposes substantive predicates to agency action; and to prevail—to have the agency withhold approval—unless certain substantive prerequisites are satisfied. These may be "benefits" with which the court of appeals is unfamiliar, but once invoked by West Farms, they confer a cognizable "individual entitlement grounded in state law." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 430.

The fact that all members of the public may derive some measure of benefit from maintaining clean air along Interstate 84 does not diminish the individualized interest that West Farms has pleaded in that resource. Nor does it dilute the individualized benefit West Farms would de-

rive if any remedial action taken by the STC or Wilmorite results in the favorable resolution of West Farms' particular and verified environmental objections or the implementation of its proposed alternatives. Moreover, the individualized benefits to West Farms (*i.e.*, the diminished health risks to its patrons or the selection of an alternative location for the proposal) are not shared by the public as a whole.

8.a. The court of appeals' inability to recognize the individual benefit accorded West Farms is, in part, the product of the clash between the Public Trust Doctrine and the jurisprudential tradition of Article III's "case or controversy" requirement. *Cf. Housatonic River*, 462 F. Supp. at 12-14. This Court has consistently interpreted the "case or controversy" requirement of Article III to demand that "the plaintiff . . . allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). This requirement serves two purposes: first, to satisfy prudential concerns "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation would be pursued with the necessary vigor . . . ." *Flast v. Cohen*, 392 U.S. 83, 106 (1968); and second, to recognize the inverse of "injury," namely, that the remedy sought will actually provide the relief requested. Put differently: the court must assure itself the plaintiff will benefit individually.

Under CEPA, standing is a matter of statutory right, "automatically granted . . . to 'any person.'" *Manchester Envtl. Coalition*, 441 A.2d at 73-74. Reconciled with CEPA's adoption of the Public Trust Doctrine, this mandate plainly reflects the Connecticut Legislature's view that each person's vigor in protecting his or her interest in trust resources against unreasonable harm is sufficient to

assure "that the appropriate parties to litigate a dispute are those who are injured or about to be injured. The purpose of this requirement is generally said to ensure the existence of concrete adverseness . . . ." *Manchester Envtl. Coalition*, 441 A.2d at 77 (citing *Flast v. Cohen*, 392 U.S. at 106).

8.b. Moreover, West Farms did not simply rely upon the benefits embodied in the statutory grant of "standing." In its petition to intervene, West Farms "differentiate[d] [its] interests from those of the general public . . . [and] alleged [a] personal stake in the outcome of the suit . . . ." *Housatonic River*, 462 F. Supp. at 712. This Court long ago discarded "the notion that an injury that is widely shared is ipso facto not an injury sufficient to provide the basis for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

The conclusion manifested in the court of appeals' analysis, that the Public Trust Doctrine—and CEPA particularly—necessarily precludes individual benefit, warrants review by this Court to reconcile the requirements of Article III with the Public Trust Doctrine.[10]

---

[10] The court of appeals found solace in its disposition of this issue because, it claimed, "Connecticut has not established protection from competition as a property right." *West Farms Associates*, App., *infra*, at 7a-8a. Independent of the uncertain validity of this assumption, see *Light Rigging Co. v. Department of Public Utility Control*, 219 Conn. 168, 176-177, 592 A.2d 386, 391 (1991), the Connecticut Legislature has recognized the value of ensuring that "partnership[s], [and] corporation[s]" act not only as applicants but as intervenors and plaintiffs, see § 22a-19, seeking to assure that public trust resources are not inappropriately allocated to such "partnership[s] [and] corporation[s]". Moreover, West Farms is required to comply with federal, state and local environmental requirements in order to enter and maintain its existence in the marketplace. The STC—by not complying with CEPA—allocates a valuable public benefit to Wilmorite. No entity seeking to enter the marketplace, for whatever commercial purpose, should be unlawfully relieved of its statutory obligation to construct its devel-

CONCLUSION

The writ of certiorari should be granted or, in the alternative, held in abeyance pending resolution of *PFZ Properties, Inc. v. Rodriguez*, No. 91-122.[11]

Respectfully submitted,

NEIL T. PROTO
Counsel of Record
JAMES F. HIBEY
FRANCES C. DELAURENTIS
MARIE L. MILLER
ERIC T. WERNER
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHTD.
901 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

February 28, 1992 *Counsel for West Farms Associates*

---

opment consistent with the protection of the public trust.

We appreciate there is no rule of this Court that warrants granting this Petition because of the lower court's prejudice vis-a-vis "competition." *Cf. City of Columbia v. Omni Outdoor Advertising*, ___ U.S. ___, 111 S. Ct. 1344 (1991). We are nonetheless constrained to suggest that the vigorous use of private sector values to protect public trust resources is precisely what Section 22a-19(b) of CEPA requires in order to fulfill its purpose.

[11] PFZ Properties' claim under 42 U.S.C. § 1983 and the Fourteenth Amendment to substantive due process steming from arbitrary, capricious and illegal decision-making may affect the nature of West Farms' claim against comparable state action.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 1991

Docket No. 91-7460

No. 169

(Argued: September 24, 1991 Decided: [Dec. 3, 1991])

WEST FARMS ASSOCIATES,
Plaintiff-Appellant,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT; EMIL H. FRANKEL; J. WILLIAM BURNS, Individually and as a Member of the State Traffic Commission of the State of Connecticut; NICHOLAS A. CIOFFI; BERNARD R. SULLIVAN, Individually and as a Member of the State Traffic Commission of the State of Connecticut; LOUIS S. GOLDBERG; LAWRENCE F. DELPONTE, Individually and as a Member of the State Traffic Commission of the State of Connecticut; THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF CONNECTICUT; WILMORITE, INC.,
Defendants-Appellees.

Before: LUMBARD, WINTER and ALTIMARI, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*) dismissing plaintiff-appellant shopping center's complaint seeking declaratory and injunctive relief under the

First and Fourteenth Amendments against the State Traffic Commission for its handling of an application for a traffic certificate by a competing shopping center.

Affirmed.

NEIL PROTO, Washington, D.C. (James F. Hibey, Frances C. DeLaurentis, Michael H. Tecklenburg, Verner, Liipfert, Bernhard, McPherson and Hand, Washington, D.C., James J. Perito, Susman, Duffy and Segaloff, New Haven, Connecticut, of counsel), *for Plaintiff-Appellant.*

GEORGE FINLAYSON, Assistant Attorney General Hartford, Connecticut (Richard Blumenthal, Attorney General of the State of Connecticut Hartford, Connecticut, of counsel), *for Defendants-Appellees State Traffic Commission; Department of Transportation; Emil H. Frankel; J. William Burns; Nicholas A. Cioffi; Bernard R. Sullivan; Louis S. Goldberg; and Lawrence F. Delponte.*

JEFFREY J. MIRMAN, Farmington, Connecticut (Peter B. Rustin, Tarlow, Levy & Droney, Farmington, Connecticut, of counsel) *for Defendant-Appellee Wilmorite, Inc.*

WINTER, *Circuit Judge*:

Plaintiff-appellant West Farms Associates ("West Farms"), owner of West Farms Mall, a shopping center, brought the instant action in the District of Connecticut, seeking declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983 (1988), against various individuals, the State Traffic Commission of the State of Connecticut ("STC"), the Department of Transportation of the State of Connecticut ("DOT"), and Wilmorite, Inc. ("Wilmorite"). Wilmorite seeks to build a shopping center that would compete with West Farms Mall. Essentially, West Farms claims that the STC's method of reviewing Wilmorite's applica-

tion to the STC for a traffic certificate violated West Farms' First and Fourteenth Amendment rights. Judge Nevas dismissed West Farms' complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

We affirm.

BACKGROUND

We assume the facts as alleged in West Farms' complaint. *See Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 57-58 (2d Cir. 1985). The STC is a three-member regulatory agency within the DOT. *See* Conn. Gen. Stat. § 14-298 (1987). The STC issues traffic certificates that are a prerequisite to private development plans affecting current traffic patterns on state or federal roads. Conn. Gen. Stat. § 14-311(a) (1987) ("No person . . . shall build, expand, establish or operate any . . . shopping center . . . until such person or agency has procured from the state traffic commission a certificate that the operation thereof will not imperil the safety of the public."). Before issuing traffic certificates, the STC must consider a number of factors, including highway safety and traffic density. *See* Conn. Gen. Stat. § 14-311(d). Because the STC has only three commissioners and an executive director, DOT officials often conduct the substantive analysis of applications before the STC.

West Farms Mall is located on the boundary between West Hartford and Farmington, Connecticut. West Farms holds two STC traffic certificates, the first of which was issued in 1972, and the second in 1982. These certificates authorized West Farms to build, and subsequently expand, West Farms Mall, and to make related roadway changes.

Wilmorite, a New York corporation, wishes to build a shopping center, to be known as Plainville Mall, approximately six miles from West Farms Mall. Plainville Mall will compete with West Farms Mall. Wilmorite has applied to the STC for a traffic certificate that would permit Wil-

morite to make changes in existing roads and highways adjacent to the proposed site of Plainville Mall.

In December 1989, West Farms petitioned to intervene in the STC's review of Wilmorite's application, pursuant to Conn. Gen. Stat. § 22a-19 (1987). In its petition, West Farms raised a number of environmental concerns for STC consideration. Intervention was granted on January 11, 1990, for the limited purpose "of raising environmental issues relevant to the issuance of a Certificate under § 14-311 of the General Statutes."

On April 18, 1990, West Farms filed the instant complaint, later amended on July 31, 1990. West Farms alleges that its status as an intervenor before the STC was illusory. West Farms claims that, since the docketing of Wilmorite's application, STC and DOT officials have had numerous *ex parte* meetings with Wilmorite at which the proposed roadway changes were considered and discussed. West Farms further alleges that multiple decisions concerning a variety of factors, including location, safety, and cost, have been made at these meetings and that West Farms has not had a formal opportunity to participate in this decision-making process. According to West Farms, it has never received notice from the STC or the DOT of these meetings, nor has it received transcripts or meeting notes from such meetings. West Farms also complains that the STC has no standards or procedures governing the consideration of applications for traffic certificates or for considering the comments of intervenors.

Based on these allegations, West Farms theorizes that it has been deprived of property rights without due process. It also claims that the STC "discriminated against the expression of West Farms' viewpoint in a public forum in violation of its right to petition under the First Amendment and of the [E]qual [P]rotection [C]lause of the [Fourteenth] Amendment." Finally, West Farms complains that the STC "failed to provide West Farms with a judicially

reviewable record," thus violating West Farms' Fourteenth Amendment due process rights, and deprived West Farms of equal protection and its First Amendment right to petition.

The defendants-appellees moved to dismiss West Farms' complaint. This motion was referred to Magistrate F. Owen Eagan, who recommended that the motion be granted. Judge Nevas thereafter entered judgment dismissing West Farms' complaint. This appeal followed.

DISCUSSION

Turning first to West Farms' property right/due process argument, we note that a plaintiff may not successfully claim a deprivation of property without due process absent the identification of a protected property interest. See *Fusco v. Connecticut*, 815 F.2d 201, 205 (2d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). "[T]he nature of the interest [must be] one within the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Federal Constitution does not create property interests. Instead, such interests are derived from other sources, such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

West Farms designates two state law sources for its claim to a protected property interest. First, West Farms asserts that the Connecticut Environmental Protection Act ("CEPA") confers a property right upon West Farms. As a formal intervenor before the STC, pursuant to the CEPA, Conn. Gen. Stat. § 22a-19(a), West Farms argues that it has the right to invoke what it styles the mandatory language of Section 22a-19(b) of the CEPA. This right, West Farms argues, is a protected property interest.

We disagree. Section 22a-19 of the CEPA provides first that interested parties may intervene in the administrative or licensing proceedings of state agencies for the limited purpose of alerting them to alleged unreasonable environ-

mental effects of the pertinent conduct. Conn. Gen. Stat. § 22a-19(a). Second, it mandates that in such proceedings, the agency "shall consider the alleged unreasonable pollution, impairment or destruction . . . and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect so long as . . . there is a feasible and prudent alternative . . . ." Conn. Gen. Stat. § 22a-19(b).

Thus, Section 22a-19 accords to an intervenor such as West Farms an opportunity to present to the STC the intervenor's views as to the effect on the environment of the development in question. The STC has no obligation to accept as true the intervenor's allegations but is free to take whatever action it believes prudent. Such a right is purely procedural, providing at best an opportunity to be heard. As we have made clear, the Due Process Clause does not protect against the deprivation of state procedural rights. See *Fusco*, 815 F.2d at 205-06; *BAM Historic Dist. Ass'n v. Koch*, 723 F.2d 233, 236 (2d Cir. 1983).

West Farms relies heavily upon *Hewitt v. Helms*, 459 U.S. 460 (1983). However, unlike Section 22a-19(b), the statute at issue in *Hewitt* imposed mandatory duties on Pennsylvania prison officials for the benefit of individual inmates. The officials were thus required to follow certain guidelines before removing an inmate from the general prison population and placing that inmate in close or maximum administrative custody. *Id.* at 470 n.6. The Court held that the prison inmates had a liberty interest protected by the Due Process Clause as a result of this Pennsylvania statutory scheme. *Id.* at 471-72.

Section 22a-19(b), as noted, neither specifies any particular action or non-action nor confers any individualized benefit. Although it accords intervenors the procedural right to be heard on the environmental effects of a development, the STC's decision is largely of a judgmental and discretionary nature. Moreover, the intended benefi-

ciaries of Section 22a-19(b) are entirely generalized, including anyone who might encounter unreasonable environmental consequences as a result of the particular development. Such universal benefits are not property interests protected by the Due Process Clause. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an *individual* entitlement grounded in state law.") (emphasis added).

Alternatively, West Farms argues that its STC traffic certificates are property protected by the Due Process Clause. Although it is true that a license essential to the pursuit of one's livelihood, once issued by the state, cannot be revoked without due process, *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971), the STC proceedings here concern whether to issue a traffic certificate to Wilmorite. No matter what the outcome of those proceedings, West Farms will retain its two STC certificates. West Farms' property is thus not threatened with deprivation.

Nor is the value of West Farms' certificates diminished by the STC proceedings. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988). West Farms was required by Connecticut law to obtain the STC certificates before building and later expanding West Farms Mall. Conn. Gen. Stat. § 14-311(a). The certificates state that the operation of West Farms Mall "will not imperil the safety of the public." The certificates do not guarantee West Farms any benefit other than allowing it to operate a mall. And, whether or not Wilmorite receives its own traffic certificate, the West Farms Mall will continue to operate without legal impediment.

It may be that the West Farms Mall will lose business if Wilmorite is permitted to build Plainville Mall. However, Connecticut has not established protection from competi-

tion as a property right. *Cf. Juster Associates v. City of Rutland, Vermont*, 901 F.2d 266 (2d Cir. 1990).

West Farms further contends that it has a First Amendment right of access to the *ex parte* meetings between the STC officials and Wilmorite. This claim also lacks merit. The STC has no federal obligation to open all of its meetings to the public. On the contrary, it is plainly permitted by the First Amendment to conduct business in private. *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976). "Nothing in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984).

Attempting to avoid the clear dictates of this case law, West Farms focuses its argument on the public forum strand of First Amendment jurisprudence. It thus argues that the STC has created a "limited public forum" and that it cannot exclude West Farms from expressing its viewpoint about the proposed Plainville Mall. However, public forum analysis applies only where a private party seeks access to public property, such as a park, a street corner, or school auditorium, in order to communicate ideas to others. *See, e.g., Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Minnesota State Bd. for Community Colleges*, 465 U.S. at 280. West Farms has not been prevented from exchanging ideas with others on public property that is by tradition or designation open to the public for speech and assembly.

West Farms further argues that, even if the STC-Wilmorite *ex parte* meetings are a nonpublic forum, the STC still may not exclude West Farms' viewpoint from those meetings. Such exclusion, West Farms contends, amounts to viewpoint discrimination. However, "[t]he nonpublic-

forum cases concern government's authority to provide assistance to certain persons in communicating with other persons who would not, as listeners, be acting for the government .... [T]he claim that government is constitutionally obliged to listen to appellees involves entirely different considerations from those on which resolution of nonpublic-forum cases turn." *Minnesota State Bd. for Community Colleges*, 465 U.S. at 282. West Farms is thus not aided by nonpublic-forum case law.

Finally, West Farms claims that the defendants-appellees have failed to keep a public record of their *ex parte* meetings and have thus denied West Farms its "right of access to meaningful judicial review." The First Amendment right to petition does include a right of access to the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). However, there is no legal foundation for West Farms' claim that this right of access obligates a state agency like the STC to keep a detailed public record of all of its proceedings for later use by a reviewing court. The two cases West Farms contends support such a proposition--*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); and *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)—are cases that interpret the Federal Administrative Procedure Act. Obviously, the First Amendment does not compel a state agency to follow the procedural requirements of the Administrative Procedure Act. *Cf. BAM Historic Dist. Ass'n*, 723 F.2d at 237 ("The Fourteenth Amendment does not impose upon states and localities . . an Administrative Procedure Act to regulate every governmental action. . . ."). We thus reject this claim as well.

CONCLUSION

Because we reject West Farms' arguments that it was deprived of property interests without due process, its First Amendment rights, and its right to judicial review, we

need not address its contentions regarding sovereign immunity or Wilmorite's status as state actor.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

CIVIL NO. H-90-320 (AHN)

WEST FARMS ASSOCIATES,

Plaintiff,

v.

STATE TRAFFIC COMMISSION, ET AL.,

Defendants,

RECOMMENDED RULING ON DEFENDANTS' MOTIONS TO DISMISS

I. INTRODUCTION

The plaintiff, West Farms Associates, has brought this action against the State Traffic Commission of the State of Connecticut (hereinafter "STC"); the Connecticut Department of Transportation (hereinafter "DOT"); J. William Burns, individually, as a member of the STC and as Commissioner of the DOT; Bernard R. Sullivan, individually and as a member of the STC; Lawrence F. DelPonte, individually and as a member of the STC; and Wilmorite, Inc., challenging the state defendants' review of Wilmorite's application for an STC Traffic Certificate. Specifically, West Farms alleges that the state defendants and Wilmorite have violated its First and Fourteenth Amendment rights by engaging in ex parts discussions, and that the STC review of Wilmorite's application for a Traffic Certificate is being conducted in the absence of appropriate regulations. West Farms seeks declaratory and injunctive relief. Pending before the court are the defendants' motions to dismiss, grounded upon claims that the court lacks

subject matter jurisdiction over this action and that West Farms has failed to state a claim upon which relief may be granted.

II. FACTUAL BACKGROUND

The court must accept the following factual allegations as true for the purpose of ruling on the defendants' motions.[1] On or about March 27, 1989, Wilmorite, a New York Corporation submitted an application to the STC, pursuant to Conn. Gen. Stat. § 14-311, (hereinafter "Application"), seeking the STC's permission to make certain federal and state highway changes that are apparently essential prerequisites to the construction and operation of Wilmorite's proposed mall to be built in Plainville, Connecticut. (Complaint ¶ 34).[2] The potential customers of the proposed Plainville mall will utilize one or more of the following routes: Interstate 84 ("I-84"), Route 72, and New Britain Avenue (Route 372). (Complaint ¶ 38). In its application for a traffic certificate, Wilmorite has proposed to accommodate increased motor vehicle traffic by constructing three new additions to the surrounding highway system, as well as other modification to local feeder roads. (Complaint ¶ 36).

On or about December 1, 1989, the plaintiff, West Farms, petitioned the STC for permission to intervene in the review of Wilmorite's application. (Complaint ¶ 42). West Farms is a Connecticut partnership and owner of West Farms Mall, which is located on the border of West Hartford and Farmington, Connecticut, approximately six

---

[1] *See Al-Charles, Inc. v. Heintz*, 620 F. Supp. 327, 330 (D. Conn. 1985). In ruling on a motion to dismiss, "whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[2] All references to the plaintiff's "Complaint" are to the Plaintiff's Amended Complaint For Declaratory And Injunctive Relief, filed July 31, 1990 (docket number 42).

miles from the site of the proposed Plainville mall. (Complaint ¶ 6). Many of its patrons and employees travel to West Farms Mall through the I-84/Route 72 corridor that will be utilized by patrons and employees of the proposed Plainville Mall. (Complaint ¶ 8). In support of its petition to intervene in the STC review of Wilmorite's application, West Farms set forth what it believed to be the potentially negative environmental, land-use, traffic and safety consequences of allowing Wilmorite to construct its mall and make attendant highway changes. (Complaint ¶ 43). In addition, West Farms identified several procedural deficiencies in the STC's review process. (Complaint ¶ 44).

On January 11, 1990, in response to West Farms' petition to intervene, the STC informed West Farms that its petition had been granted "solely for the purpose of raising environmental issues relevant to the issuance of a Certificate under Section 14-311 of the [Connecticut] General Statutes." (Complaint ¶ 47).[3] West Farms claims that the STC, despite granting its petition to intervene, has failed to keep West Farms informed of the status of the application review, thereby rendering West Farms' intervenor status illusory. (Complaint ¶¶ 53-55). The STC and Wilmorite have continued to meet to discuss Wilmorite's application without giving West Farms notice and an opportunity to participate in these discussions. (Complaint ¶ 48).

West Farms commenced the present action, alleging violations of its First Amendment right to petition for redress and Fourteenth Amendment right to due process. The state defendants and Wilmorite, by two separately filed motions, have moved to dismiss the plaintiff's claims

---

[3] The Environmental Protection Act of 1971, Conn. Gen. Stat. §§ 22a-14 to 22a-20, provides "all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction." Conn. Gen. Stat. § 22a-15. See section III.B.1. *infra*.

on the grounds that (1) the Eleventh Amendment bars the court from exercising jurisdiction over the plaintiff's claims; (2) the plaintiff fails to allege the deprivation of a property interest deserving of due process protection; and (3) the plaintiff has failed to allege a valid denial of the right to petition claim. Each ground for dismissal will be discussed seriatim.

III. DISCUSSION

A. Eleventh Amendment

At the outset, the court must decide whether the Eleventh Amendment bars the present action.[4] If applicable to this case, the Eleventh Amendment effectively deprives this court of subject matter jurisdiction over the plaintiff's claims. *Hans v. Louisiana*, 134 U.S. 1 (1890). Before it may proceed to a review of West Farms' substantive claims, the court is required to determine whether or not it has jurisdiction over those claims. *Trinanes v. Schulte*, 311 F. Supp. 812 (D.C.N.Y. 1970); *see also* Wright & Miller, *Federal Practice and Procedure*, Civil 2d § 1350 (1990).

In the present case, West Farms alleges that the defendants have illegally conducted a review of Wilmorite's application in violation of the due process clause of the Fourteenth Amendment, and requests declaratory and injunctive relief, costs and attorney's fees (Prayer for Relief ¶¶ 1-5). The court must make its determination of whether it has jurisdiction over West Farms' claims while keeping

---

[4] The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

The Eleventh Amendment has been interpreted to govern suits against a state by one of its own citizens. *See Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 280 (1973).

in mind that West Farms may not artfully draft its allegations to evade Eleventh Amendment immunity. *Arden House, Inc. v. Heintz*, 612 F. Supp 81, 85 (D. Conn. 1985).

The sovereign immunity of the several states, preserved by the Eleventh Amendment, prohibits the exercise of federal court jurisdiction over suits against states that have not consented to being sued, and therefore sovereign immunity "is a constitutional limitation on the federal judicial power established in Art[icle] III." *Pennhurst State School & Host. v. Halderman*, 465 U.S. 89, 98 (1984); *Ex Parte State of New York*, 256 U.S. 490, 497 (1921). The Eleventh Amendment bar extends to the states themselves as well as to any "arm of the state", including state agencies and state officials acting in their official capacities. *Mount Health City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Galvin v. Lloyd*, 663 F. Supp. 1572, 1581 (D. Conn. 1987). A suit seeking retroactive monetary relief from a state, its agencies or officers may not be brought in federal court. *Edelman v. Jordan*, 415 U.S. 651 (1974). While Congress may, pursuant to the enforcement provisions of Section 5 of the Fourteenth Amendment, abrogate the Eleventh Amendment, 42 U.S.C. § 1983, the civil rights statute upon which the present action is premised, "does not override a state's Eleventh Amendment immunity against suits seeking monetary relief." *Arden House, Inc.*, 612 F. Supp. at 85 (D. Conn. 1985). *See Quern v. Jordan*, 440 U.S. 332, 341 (1979).

The most important exception to the doctrine of sovereign immunity, and indeed the one exception relevant to this case, is that "a suit challenging the constitutionality of a state official's conduct is not one against the state." *Pennhurst*, 465 U.S. at 102. The reason for this exception is that a state could not properly allow an official to act unconstitutionally, and therefore an official acting unconstitutionally is deemed to have forfeited his official character and becomes personally liable for damages flowing from his unconstitutional acts. *Ex Parte Young*, 209 U.S.

123 (1908). Any relief awarded in such an action is limited to prospective declaratory and injunctive relief. *Pennhurst*, 465 U.S. at 102, 103. Declaratory and injunctive relief may not be awarded, however, if the challenged conduct of a state official is alleged to violate only state law; the federal courts are barred by the Eleventh Amendment from exercising jurisdiction over suits seeking to compel state officials to comply with state law. *Id.* at 117.

In this case, West Farms has named as defendants five state entities; (1) the Connecticut Department of Transportation (DOT); (2) the State Traffic Commission, a commission within the DOT; (3) J. William Burns, the Commissioner of the DOT and a member of the STC; (4) Bernard R. Sullivan, the Commissioner of the Department of Public Safety and a member of the STC; and (5) Lawrence F. DelPonte, the Commissioner of the Department of Motor Vehicles. The three individual defendants are sued in their official capacities as commissioners and members of the STC,[5] as well as in their individual capacities. Because the issue of whether the DOT and the STC are immune from suit raises different questions that the issue of immunity for the individual state defendants, the two will be discussed separately.

1. Immunity of State Agencies

Construing all of the allegations of its complaint favorably to West Farms, the court is unable to find sufficient facts to establish federal court jurisdiction over the Connecticut DOT and the STC. The DOT is clearly an "arm of the state"[6], and therefore immune from suit absent

---

[5] Conn. Gen. Slat. § 14-298 mandates that the State Traffic Commission consist of the commissioners of transportation, public safety and motor vehicles.

[6] The DOT is a department of the State of Connecticut, created by the State Transportation Act, Conn. Gen. Stat. §§ 13b-1 to 13b-57c. The General Assembly has delegated to the DOT responsibility "for all aspects of the planning, development, maintenance and improvement of transportation in the state." Conn. Gen. Stat. § 13b-3.

consent. Although West Farms has alleged that unnamed employees of the Connecticut DOT actually perform the review of an application before the STC, (Complaint ¶ 22), this allegation is insufficient to overcome the obvious--a suit against the Connecticut DOT is actually a suit against the state itself, and is barred by the Eleventh Amendment regardless of the nature of the relief sought. *Cory v. White*, 457 U.S. 85, 91 (1982).

Similarly, the court does not have jurisdiction over the claims against the STC. Within the DOT, the Connecticut General Assembly has created the STC, a commission which, pursuant to Conn. Gen. Stat. § 14-298, is charged with certain functions related to traffic safety, including the issuance of a certificate to shopping center operators which establishes that the operation of a shopping center "will not imperil the safety of the public." Conn. Gen. Stat. § 14-311. Because the STC, by statute, is a commission within the DOT to which the Connecticut General Assembly has delegated certain traffic-related responsibilities, a suit against the STC is actually a suit against the state, which, for the reasons stated *supra*, is barred by the Eleventh Amendment. *See Cory*, 457 U.S. at 90-91.

In its memorandum, West Farms argues that the Connecticut DOT and the STC are not entitled to Eleventh Amendment protection unless they are able to show that "they are immune from such suit under Connecticut common law." (West Farms' Memo. in Opposition, pp. 21-22). West Farms supports this argument by citing to several Connecticut cases which have allowed plaintiffs to bring suits directly against the state in state courts seeking declaratory and injunctive relief.[7] However, because "[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued,"

---

[7] *See Sentner v. Board of Trustees*, 184 Conn. 339 (1981); *Horton v. Meskill*, 172 Conn. 615 (1977); *Krozser v. City of New Haven*, 212 Conn. 415 (1989), *cert. denied*, 110 S. Ct. 757 (1990).

Pennhurst, 465 U.S. at 99, the Supreme Court has established a stringent test for determining whether a state has waived its immunity from federal court jurisdiction. "Thus, in order for a *state statute or constitutional provision* to constitute waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985) (emphasis added). The authorities relied upon by West Farms are silent as to whether Connecticut has waived its sovereign immunity in federal court, so the court must look to the Connecticut Constitution and statutes to determine whether the state has waived its Eleventh Amendment constitutional protection.

Art. XI § 4 of the Connecticut Constitution provides "[c]laims against the state shall be resolved in such manner asmay be provided by law." In response to this constitutional provision, the Connecticut General Assembly has created the position of claims commissioner "who shall hear and determine all claims against the state . . ." Conn. Gen. Stat. § 4-142. "Claim" as used in the chapter on claims against the state is defined as "a petition for the payment or refund of money by the state *or for permission to sue the state*." Conn. Gen. Stat. § 4-141 (emphasis added). When the claims commissioner grants permission to sue the state, the state "waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of." Conn. Gen. Stat. § 4-160(a). Any action against the state brought with the permission of the claims commissioner must be brought in an appropriate Connecticut Superior Court. Conn. Gen. Stat. § 4-160(b).

Nothing in the chapter on claims against the state or the Connecticut constitution even remotely suggests that the state of Connecticut has consented to suit in federal court. Art. XI § 4 of the Connecticut constitution, by providing that claims against the state shall be resolved as

provided by law, does not constitute a waiver the sovereign immunity of the state, but rather, authorizes the General Assembly to establish a procedure for resolution of claims. Such an authorization is insufficient for the court to find that Connecticut has waived its constitutional immunity. *Atascadero*, 473 U.S. at 241. The defendants' motion to dismiss the Connecticut DOT and the STC is granted.

2. Immunity of Individual Defendants.

The three individual commissioners named as defendants in this action raise questions of immunity that differ from those raised as to state agencies and commissions. While the federal courts are generally barred by the Eleventh Amendment from exercising jurisdiction over claims against the states, the federal courts have jurisdiction over claims seeking prospective relief from state officials acting unconstitutionally. *Ex Parte Young*, 209 U.S. 123 (1908). "Under the theory of *Young*, such a suit would not be one against the state since the federal-law allegation would strip the state officer of his official.authority." *Pennhurst*, 465 U.S. at 103.

In this case, West Farms alleges that Commissioners Burns, Sullivan and DelPonte, acting under color of state law, have violated its rights to due process and to petition for redress. Construing the allegations of the complaint in favor of West Farms, the court finds that it has jurisdiction to consider West Farms' claims for appropriate prospective relief for any unconstitutional actions of the individual defendants. The defendants' motion to dismiss West Farms' claims against the individual defendants is denied.

3. Claims Against Wilmorite

Defendant Wilmorite, in its Reply Memorandum (docket no. 50), has raised immunity arguments which are similar to those raised by the state defendants, but does not claim that it is entitled to Eleventh Amendment protection.

However, the court dismisses West Farms' claims against Wilmorite on the ground that the allegations in West Farms' complaint fail to establish that Wilmorite's conduct constitutes state action, a necessary element of any claim alleging deprivations of constitutional rights. *Monroe v. Pape*, 365 U.S. 167 (1961).

West Farms does not dispute that Wilmorite is a private party. Thus, to properly state a cause of action against Wilmorite for a deprivation of a constitutional right,

> under established state action doctrine, the plaintiff must show that the defendants' actions were commanded or encouraged by the federal government, or that the defendants were so intertwined with the government as to become painted with the color of state action.

Mahoney v. National Organization For Women, 681 F. Supp. 129, 132 (D. Conn. 1987). *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721 (1961); *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). In this case, West Farms does not allege that Wilmorite was recommended or encouraged to deprive it of its constitutional rights, nor does it allege that Wilmorite and the STC have become so intertwined as to become indistinguishable. Wilmorite is participating in an application review process in accordance with § 14-311 of the Connecticut General Statutes, and although that process involves contact with state agencies and officials, none of the allegations of West Farms' complaint establish that Wilmorite has assumed responsibilities that are reserved for those state agencies and officials. Wilmorite's motion to dismiss is granted.

B. Due Process Claims

In Counts I and II of its complaint, West Farms alleges that it has been deprived of certain property interests without due process of law in violation of the Fourteenth

Amendment.[8] The court's review of West Farms' Fourteenth Amendment claims entails a two-step process. First, the court must determine "whether the nature of [West Farms'] interest is one within the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972)). Second, if the court finds that the plaintiff has been deprived of a protected liberty or property interest, then "the question remains what process is due." *Morrissey*, 408 U.S. at 481.

In its Amended Complaint and memoranda in opposition to the defendants' motions, West Farms alleges that it possesses protected property interests created by three sources: (1) the public trust in the natural resources of the state established by the Connecticut Environmental Protection Act, Conn. Gen. Stat. § 22a-15; (2) the issuance by the STC to West Farms of STC Certificates pursuant to Conn. Gen. Stat. § 14-311; and (3) its causes of action and right to judicial review under the Connecticut Environmental Protection Act, the Traffic Act and its STC Certificates. Because each alleged property interest raises different issues, each will be discussed separately.

1. The Environmental Protection Act

West Farms claims that it has been deprived of its property interests created by the Connecticut Environmental Protection Act of 1971, Conn. Gen. Stat. §§ 22a-

---

[8] Counts I and II of the Amended Complaint allege deprivations of due process. Count I purports to address "violations of the 14th Amendment and 42 U.S.C. § 1983, while Count II addresses "violation of the 14th Amendment". 42 U.S.C. § 1983 "is not itself a source of substantive rights, but [is] a method for vindicating federal rights elsewhere conferred by . . . the United States Constitution and federal statutes." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). Because in Count I the alleged "violation" of 42 U.S.C. § 1983 is actually a claim of deprivation of a right protected by the Fourteenth Amendment, and is therefore identical to the claim made in Count II, the Court will discuss these Counts together.

14 to 22a-20 (hereinafter the "Protection Act"). Specifically, the Protection Act provides "all persons" with "an adequate remedy to protect" the natural resources of Connecticut.[9] The Protection Act allows any person (including a partnership) to bring suit against any entity (including the State of Connecticut and its agencies) to protect the public trust in the environment. Conn. Gen. Stat. § 22a-16.[10] In addition, the Protection Act allows any entity, including a partnership, to intervene in any

> "administrative, licensing or other proceeding . . . which does, or is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

Conn. Gen. Stat. § 22a-19(a).[11] An entity which intervenes in an agency proceeding pursuant to § 22a-19(a) has stand-

---

[9] Conn. Gen. Stat. § 22a-15 provides:

> It is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.

[10] Conn. Gen. Stat. § 22a-16 provides, in relevant part:

> any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court . . . for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization, or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.

[11] Further, 22a-19(b) provides:

ing to appeal an adverse decision from that agency to the superior court. *Red Hill Coalition, Inc. v. Conservation Comm'n of Town of Glastonbury*, 212 Conn. 710 (1989).

In this case, West Farms successfully petitioned the STC for permission to intervene to protect the public trust. (Complaint ¶ 47). Along with its petition, West Farms submitted documentation relating in part to the environmental consequences that may result from allowing Wilmorite to build its mall. (Complaint ¶¶ 43, 44). West Farms has not yet had the opportunity to express its environmental concerns directly to the STC at a hearing because the STC has not held a hearing on the merits of either Wilmorite's application or West Farm's environmental claims. To date, no decision has been made by the STC to grant or deny Wilmorite's application.

Even construing the facts as alleged in favor of the plaintiff, West Farms' claim that they have a property interest created by the Protection Act is without merit. In *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990), the Connecticut Supreme Court refused to decide whether the Protection Act conferred upon entities certain property rights entitled to due process protection. *Sterling* involved an appeal of a Connecticut Siting Council grant of a certificate permitting the construction of an electricity generating facility. Holding that the appellants in *Sterling* had alleged the requisite statutory aggrievement necessary to establish standing to raise an appeal to address their environmental concerns,

---

In any administrative, licensing or other proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect so long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

the court reserved for another occasion the question of "the extent to which the act would confer such property rights in the absence of a showing of any specific personal or legal interest in the subject matter of the proceedings at issue." *Id.* at 484, n5. In light of the holding of the Connecticut Supreme Court in *Sterling*, this court cannot agree with West Farms that the Connecticut Supreme Court has held that the Protection Act confers upon West Farms a property interest entitled to Fourteenth Amendment protection.

Further, the court does not agree with the plaintiff's claim that the Protection Act itself confers a protected property interest upon West Farms. "The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' " *Logan v. Zimmerman Brush*, 455 U.S. 422, 430 (1982). "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972).[12] In *Roth* the court further states:

> To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Id. at 577.

---

[12] For example, specific benefits entitled to due process protection have been held to include: public employment, *Roth*; welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); utility service, *Memphis Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); driver's license, *Bell v. Burson*, 402 U.S. 535 (1971); a cause of action created by state law, *Zimmerman Brush*; and trade secrets, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

In this case, West Farms' alleged interest in the natural resources of the state of Connecticut falls far short of being a protected property interest. Whatever the interest West Farms has alleged to have in the environment in which Wilmorite proposes to build its mall, that interest certainly is not exclusively possessed by West Farms; West Farms cannot claim any greater entitlement to the air, water and natural resources pursuant to § 22a-15 than could any citizen of the entire state. West Farms' report to the STC, incorporated into its Amended Complaint by reference, does not allege any harm to its own land and adjacent air, water or other natural resources, but rather alleges harm to the general public and surrounding lands.[13] West Farms' interest in the natural resources of Connecticut is defined not by federal law, but rather by Connecticut law, and the Connecticut General Assembly's creation of a "public trust" in the natural resources of the state does not confer upon West Farms an exclusive entitlement to those resources that, in turn, is entitled to Fourteenth Amendment protection.

2. West Farms' STC Licenses

West Farms claims that its holding of traffic certificates issued by the STC creates protected property interests that are threatened by the construction of Wilmorite's mall in Plainville. This claim is without merit. It is true that, under certain circumstances, a license issued by a state agency confers upon the licensee a property interest entitled to Fourteenth Amendment protection. To rise to the

---

[13] For example, Paragraph 10 of the Verified Complaint alleges that the proposed mall will cause "increased air pollution", "increased risk of health hazards to selective population" and "increased pollutant-laden storm water run-off". However, West Farms does not allege that these deleterious effects will deprive it of the use of its own land, but rather, in Paragraph 3 of its Verified Complaint, alleges that its "gross sales are directly effected by the ease and safety of access to West Farms by patrons and by the environmental soundness of highway planning . . . ."

level of a property interest, a license must create more than a "unilateral expectation" in its continuation. Traditionally, the "deprivation" of that interest has taken the form of a suspension or revocation. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (citing cases). In this case, West Farms alleges that the STC reserves the right to alter or revoke the traffic certificates issued to West Farms, but does not allege that the STC is even considering the revocation or alteration of West Farms' traffic certificates. No reading of West Farms' claims suggests that its traffic certificates are currently at risk of being revoked or revised.

West Farms further claims that the benefits which inure by virtue of its possession of the STC certificates are entitled to Fourteenth Amendment protection. This claim is equally without merit. By issuing a traffic certificate, the STC only certifies that the operation of the facility named on a certificate "will not imperil the safety of the public." Conn. Gen. Stat. § 14-311(a). The STC is not required to consider the economic benefits which may be enjoyed by a licensee or applicant through the operation of a licensed facility.[14]

West Farms is unable to overcome the holding in *Fleagane Enterprises d/b/a Wendy's Old Fashioned Burners v. Dole*, Civil No. 4-85-662 (MJB) slip op. (D. Conn., July 16, 1986). *Fleagane* was an action brought by an operator of a restaurant against the federal and state departments of transportation alleging that the expansion and relocation of Interstate 91 north of Hartford, Connecticut, redirected traffic away from the plaintiff restaurant in violation of

---

[14] § 14-311(d) provides, in relevant part:

> In determining the advisability of such certification, the state traffic commission shall include, in its consideration, highway safety, the width and character of the highways effected, the density of traffic thereon and the character of such traffic.

a protected property interest. The court, in dismissing the plaintiff's claims, held that a person does not hold a constitutionally protected property interest in "the design or location" of public roads. *Id.*, slip op. at 8. Construing Connecticut law, the court found that "a landowner's rights with respect to the continuance of a public way are limited to the right of access to the public land immediately adjacent to his land and to the system of public roads." *Id.* Further, the court held that an entity

> cannot claim a property interest in the volume of automobile traffic that passes the restaurant or in the number of customers it serves. No state or federal "rules or understandings" recognize an individual entrepreneur's "entitlement" to a continued volume of public business growing out of entirely discretionary governmental action or inaction.

Id., slip op. at 9. In this case, West Farms has no entitlement to the volume of traffic that may pass its location, and does not allege that it will be denied access to its property. West Farms has failed to allege that it possesses a protected property interest subject to deprivation by the conduct of the present defendants.[15]

3. West Farms' Statutory Causes of Action

West Farms' third alleged property interest ostensibly is created by certain "causes of action" provided for by the sections of the Connecticut General Statutes already

---

[15] West Farms attempts to distinguish Fleagane by arguing that its STC certificates are explicit or implicit governmental promises, apparently rising to the level of a contractual obligation. The certificates issued in accordance with § 14-311 can hardly be said to be contractual in light of the reservation by the STC of the authority to revoke the certificates. The only readily apparent promise made by the STC in the certificates is that revocation will be proceeded by "due notice." (Complaint, Exh. A). West Farms does not allege that its licenses are being reviewed by the STC.

discusses, namely the Traffic Act and the Protection Act. The gravamen of this third claim is that these statutory causes of action are "impeded and denigrated" by the lack of regulations governing the consideration by the STC of the environmental concerns represented by West Farms, and by the absence of a "judicially reviewable record". (West Farms' Memorandum in Opposition at 35).

There is little doubt "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 485 (1988) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)). However, a statutory "cause of action" must be distinguished from statutory language defining review procedures for persons aggrieved by the decisions of administrative agencies. A statutory review procedure for an aggrieved person creates a right which "is purely procedural and does not give rise to an independent interest protected by the fourteenth amendment." *Fusco v. State of Conn.*, 815 F.2d 201 (2d Cir.), *cert. denied*, 484 U.S. 849 (1987); *BAM Historic Dist. v. Koch*, 723 F.2d 233, 236-7 (2d Cir. 1983).

West Farms is unable to distinguish this case from the holding in *Fusco*, where the court dismissed a claim by plaintiff property owners alleging that the reclassification by a zoning board of appeals of land adjoining that owned by the plaintiffs was a deprivation of Fourteenth Amendment due process rights. As in *Fusco*, West Farms does not allege that its "property has been taken or [its] use of it so drastically regulated as to destroy its value." *Id.* at 206 (citing *BAM Historic Dist.*, 723 F.2d at 237). *See also Cofone v. Manson*, 594 F.2d 934 (2d Cir. 1979). West Farms only claims interference with certain statutory venues for redress, which falls short of being denied a "cause of action." Counts I and II of West Farms' Complaint are dismissed for failure to state a claim upon which relief could be granted.

C. West Farms' Right to Petition Claim

In Count III of its Complaint, West Farms alleges that it has been denied both the right to petition in violation of the First Amendment and equal protection of the laws in violation of the Fourteenth Amendment. This Count is dismissed for the reasons that follow.

West Farms asserts that, by holding meetings with Wilmorite and the Town of Plainville, the STC has created a "public forum" to which West Farms has been denied access. While it concedes that it will be entitled to participate in the public meeting of the STC Commissioners, West Farms nonetheless claims that "it is deprived of its constitutional right to petition where the formal meeting is but a *pro forma* exercise implementing decisions previously made in *ex parte* meetings." (Pltf's Memo. in Opposition at 44). West Farms alleges that these *ex parte* meetings constitute a "public forum" from which it has been unconstitutionally excluded, a conclusion unsupported by case law and the allegations of West Farms complaint.

While a public body may not restrict participation in a public forum created for direct citizen involvement, "public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business." *Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n*, 429 U.S. 167, 175 (1976). Because "[g]overnment makes so many policy decisions affecting so many people that it would grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard . . ., [a]bsent statutory restrictions, the State must be free to consult or not to consult whomever it pleases." *Minnesota Bd. For Community Colleges v. Knight*, 465 U.S. 271, 285 (1984). The Supreme Court has held that "[n]othing in the First Amendment or in th[e] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public

issues." *Id.* at 285. In this case, West Farms' claim that it has been deprived access to a public forum is without merit. As the case law clearly establishes, the state is entitled to proceed with its review and gather information in private, and may choose to consult with whatever entities it chooses to consult. West Farms concedes that it does not expect to be deprived of access to the public meeting of the STC commissioners, and admits that it has been able to submit written materials addressing its concerns. West Farms does not allege in its complaint that it has been denied access to any documents in the possession of the STC or that the STC has refused to engage in communications with its own employees or agents. West Farms has failed to establish that non-public meetings involving STC employees constitute a "public forum" to which West Farms has a First Amendment right of access. Defendants' motion to dismiss West Farms' First Amendment claim in Count III is granted.

IV. CONCLUSION

For the foregoing reasons, the defendants' motions to dismiss West Farms' claims against the Connecticut Department of Transportation and the State Traffic Commission are GRANTED on the ground that the Court lacks subject matter jurisdiction over these claims. The defendants' motions to dismiss West Farms' claims against Wilmorite and Commissioners Burns, DelPonte and Sullivan are GRANTED on the ground that West Farms has failed to state a claim upon which relief could be granted.

Any objections to this report and recommendation must be filed with the Clerk of Courts within 10 days after service of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.

Dated at Hartford, Connecticut this 29th day of January, 1992.

/s/ _____
F. Owen Eagan
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil No. H-90-320 (AHN)

WEST FARMS ASSOCIATES,

Plaintiff,

v.

STATE TRAFFIC COMMISSION, ET. AL.,

Defendants,

RECOMMENDED RULING ON DEFENDANTS' MOTIONS TO DISMISS

4/5/91. After careful review of the Magistrate's Recommended Ruling and of the submissions of the parties both in support and in opposition to the Ruling, the court accepts the Recommended Ruling and finds it to be well reasoned. It is approved and adopted.

SO ORDERED.

/s/ _____
Alan H. Nevas, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

H-90-320 AHN

WEST FARMS ASSOCIATES

VS.

STATE TRAFFIC COMMISSION, ET. AL.

JUDGMENT

This action having come on for consideration of the defendants' motions to dismiss before the Honorable F. Owen Eagan, United States Magistrate Judge and the Honorable Alan H. Nevas, United States District Judge, and,

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Recommended Ruling on Defendants' Motions to Dismiss, granting the motions.

It is accordingly, ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered dismissing the complaint.

Dated at Hartford, Connecticut, this 9th day of April, 1991.

KEVIN F. ROWE, Clerk

By /s/ _____
Dennis P. Iavarone
Deputy in Charge

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment of the United States Constitution provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

2. Section 22a-19 of the Connecticut Environmental Protection Act of 1971, Conn. Gen. Stat. Ann. § 22a-19, provides:

§ 22a-19. Administrative proceedings

(a) In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

(b) In any administrative, licensing or other proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect so long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

APPENDIX D

STATE OF CONNECTICUT

DEPARTMENT OF TRANSPORTATION

STATE TRAFFIC COMMISSION

IN RE: PROPOSED PLAINVILLE MALL
PLAINVILLE, CONNECTICUT
DECEMBER 1, 1989
STC No. 109-8903-01

WEST FARMS ASSOCIATES
VERIFIED PETITION FOR DESIGNATION AS A PARTY AND NOTICE OF INTERVENTION

West Farms Associates hereby moves pursuant to the Uniform Administrative Procedures Act, Conn. Gen. Stat. Sec. 4-177a(a), and the Regulations of the Commissioner of the Department of Transportation, Conn. Agencies Regs. Sec. 13b-17-116, for designation as a party and, pursuant to the Connecticut Environmental Protection Act, Conn. Gen. Stat. Sec. 22a-19(a), the Uniform Administrative Procedures Act, Conn. Gen. Stat. Sec. 4-177a(b) and Conn. Agencies Regs. Sec 13b-17-117, to intervene in the above captioned proceedings. In support of this Petition and Notice, West Farms Associates states the following:

WEST FARMS ASSOCIATES

1. West Farms Associates is a Connecticut partnership, which owns West Farms Mall (hereinafter referred to as West Farms) a one million square foot (Gross Leasable Area) regional shopping mall, consisting of four department or anchor stores and 119 small shops and boutiques. It has been in operation since October 1974.

2. West Farms is located at 500 West Farms Mall, Farmington, Connecticut, on the Farmington-West Hart-

ford boundary line, at the juncture of Route 71 (New Britain Avenue) and Interstate 84 ("I-84") (Exit 40), approximately six miles from the site of the proposed Plainville Mall (described in more detail, below). It employs approximately 2400 to 3800 people (depending on the season), many of whom live in the Greater West Hartford-Central Connecticut region, including Plainville or its environs and use Interstate 84 and Route 72 (southwest of West Farms) to traverse to work. In addition, approximately 13,000,000 people patronize West Farms yearly, many of whom live in the vicinity of the proposed Plainville Mall or otherwise acquire access to West Farms via I-84, Route 72 and other local roadways. The proposed Plainville Mall is within the West Farms trade area.

3. The health and safety of such patrons and employees will be affected by (i) the congestion, dangerous conditions or disruption of existing traffic patterns and access that will result from the roadway changes proposed in the State Traffic Commission ("STC") Application that is the subject of this proceeding and (ii) the enormous increase in vehicular traffic on and adjacent to I-84, Route 72 and other local roadways that will result from the construction and operation of the proposed Plainville Mall. Moreover, West Farms Associates derives income from the rental of space in West Farms, which is affected by the gross sales generated by each West Farm tenant. Such gross sales are directly affected by the ease and safety of access to West Farms by patrons and by the environmental soundness of highway planning, both of which will be directly and adversely affected by the roadway changes for the proposed Plainville Mall and their effects described below in Paragraphs 4 through 11.

THE PROPOSED PLAINVILLE MALL

4. The proposed Plainville Mall will be constructed by Wilmorite, Inc. ("Wilmorite"), a corporation located at 1265 Scottsville Road, Rochester, New York. It will be located

north and immediately adjacent to the overlap of I-84 (a federal aid highway) and Route 72 (a state financed, limited access highway)on the southwest corner of Route 372 (New Britain Avenue, a state financed highway) and Crooked street.

5. Wilmorite has informed the STC that it intends to construct "a 1,310,000 square foot Gross Leasable Area ("GLA") shopping mall, with a completion date of 1993, the design year". Such a mall will be among the largest in Connecticut. Its service area includes the area served by West Farms.

6. A mall of the size proposed by Wilmorite will generate, according to the Institute of Traffic Engineers' Trip Generation Manual (4th Edition, 1987) approximately 41,800 motor vehicle trips a weekday and 3,760 motor vehicle trips during weekday peak hours. These motor vehicle trips represent a radical and massive increase to the existing roadways that already are heavily burdened.

7. Many of these new motor vehicle trips, as well as those "potential shoppers" that already pass the site, will utilize I-84, Route 72 and New Britain Avenue either for the first time or in a manner (i.e., entering and exiting all such roadways) different and inherently more dangerous (i.e., stop, start, acceleration, weaving) than before.

8. The roadway changes essential for the proposed Mall, and partially summarized by Wilmorite in its Application to the STC, are dramatic in size and configuration. In addition to significant and numerous changes in various feeder roads onto or proximate to I-84, Route 72 and New Britain Avenue, Wilmorite proposes three new, direct additions to the federal and state highway system, including:

- a new off-ramp from Route 72 eastbound connecting with Hooker Street at Farmington Avenue. This new off-ramp requires the acquisition of private property, the use or dedication of existing, govern-

ment-owned right of way, and the destruction (actual and effective) of open space.

- a new on-ramp leading to I-84 eastbound, from Crooked Street opposite the existing I-84 eastbound off-ramp. This new on-ramp requires the acquisition of private property, the use or acquisition of existing, government-owned right of way and the destruction (actual and effective) of open space.
- a new ramp from Route 72 westbound (just past the I-84 diverge), leading into and forming a new collector/distributor one-way service road that leads to New Britain Avenue. This new ramp and related roadway require the acquisition of private property, the use or dedication of existing, government-owned right of way, and the destruction (actual and effective) of open space and wetlands.

STATE TRAFFIC COMMISSION PROCEEDING AND ROADWAY'S EFFECTS

9. On or about March 31, 1989, Wilmorite (through the Sear-Brown Group) submitted to the STC its Application for Certificate and related materials. One set of the Application and related materials was to be sent by the STC to the Federal Highway Administration ("FHWA").

10. This Certificate, if granted, would permit Wilmorite to construct the roadway additions described in its Application as well as assure, among others, the direct and indirect environmental, traffic and safety consequences identified in Paragraphs 3 through 8, above. Moreover, as a matter of law and traffic and commercial necessity, Wilmorite cannot build its proposed 1.3 million square foot Mall in the absence of such a State-granted Certificate. Consequently, these roadway changes and additions, and the mall that cannot be built in their absence, will generate the following effects, separately and cumulatively, in addition to those described in Paragraphs 3 through 8, above:

- increased air pollution and increased risk of health hazards to selective populations (i.e., heart disease) within the Air Quality Region generally, within particular neighborhoods adjacent to the Mall site, and along the I-84, Route 72 and New Britain Avenue corridors;
- alter irrevocably the amount and nature of motor vehicle traffic and the existing traffic patterns and usages along the I-84, Route 72, and New Britain Avenue corridors;
- alter and diminish current levels of safety and increase traffic congestion along the I-84, Route 72, and New Britain Avenue corridors;
- alter irrevocably land use patterns, including related roadways, safety assumptions and all transportation usage in the immediate area of Plainville and, in light of the proposed Mall's size and the roadway changes required to service it, within the entire Western Hartford-Central Connecticut region and with particular reference to the probable decline or relocation of retail and commercial development in New Britain, Bristol, West Hartford, Southington, Farmington and downtown Plainville;
- increased fuel consumption;
- increased, pollutant-laden storm water run-off from new roadways, including run-off into the Quinnipiac River Watershed Area and Hamlin Pond;
- increased, long-term roadway repair, maintenance and administrative costs to the State, beyond initial construction and right of way costs presumably borne by Wilmorite;
- increased, long-term burden on State and municipal planners and taxpayers throughout the region to expand and finance roadways in response to the

Wilmorite proposal and their related maintenance and safety problems; and

- increased endangerment of roadway users and pedestrians because of increased traffic, congestion and the introduction of unfamiliar traffic patterns and roadways and new motor vehicle destinations.

11. In addition to the harm described above, the roadway changes for the Plainville Mall, along with other roadway changes or expansions and development, already approved or pending approval by state or local agencies, will have cumulative, adverse traffic, safety and environmental effects.

DUTY OF THE STATE TRAFFIC COMMISSION

12. The roadway changes and additions proposed in the Wilmorite Application, and the operation of the Plainville Mall, will have measurable, direct affects on (1) roadway safety (Conn. Gen. Stat. Sec. 14-311(d)) and (2) the imperilling of the public safety (Conn. Gen. Stat. Sec. 14-311(a)). Such changes and additions also will directly affect the legal rights and duties, societal responsibilities, financial burdens and the personal and family choices and risks of pedestrians, businesses, other private or public organizations and their purposes and members, corporate interest, including West Farms and its patrons and employees (as described in Paragraphs 2 and 3, above), municipal governments in addition to Plainville (e.g., Bristol, Farmington, West Hartford, Southington, New Britain), the State of Connecticut (roadway maintenance, repair, increased liability) and the Federal Highway Administration.

13. The STC must identify, determine or assess, as part of and prior to its determination under Sec. 14-311 whether the operation of the Plainville Mall affects roadway safety

and imperils the safety of the public, the following matters, *inter alia*:

- the definitions of "safety," "imperils," the "public" and "operation";
- the nature, reliability and predictive accuracy of the methodology (CAPCALC 85) used by the Applicant, Wilmorite;
- the fact-finding procedure for assuring that the assertions made by the Applicant, Wilmorite, are true;
- the procedure for identifying, weighing and balancing the legal rights and responsibilities as well as the other consequences to the range of participants affected by this Application and identified in Paragraph 12, above; and
- the rules specifying the evidentiary burden on Wilmorite of demonstrating that its proposal will not "imperil" the "public safety".

14. The Wilmorite Application (i.e., the roadway changes and the operation of the Mall) involves conduct "which is reasonably likely to have the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state", Conn. Gen. Stat. Sec. 22a-19. Such effects are described, in part, in Paragraphs 3 through 8 and 10 through 12.

15. The STC shall, under the circumstances described in Paragraph 14 and prior to its determination under Sec. 14-311, consider the alleged effects of the roadway changes and the Mall's operation and not authorized or approve any conduct "which . . . is reasonably likely to have such effect [of unreasonably polluting, etc.] so long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health and

safety," Conn. Gen. Stat. Sec. 22a-19. Consequently, the STC must identify and consider all reasonable and prudent alternatives to the Wilmorite proposal including, but not limited to:

- no approval;
- alternative locations for the roadway changes that are less environmentally harmful;
- alternatives to the "operation" (Conn. Gen. Stat. Sec. 14-311(a)) of the mall, including alternative ways of providing the same or comparable services for a million square foot regional mall, that are "consistent with the reasonable requirements of the public health, safety and welfare". Conn. Gen. Stat. Sec. 22a-19(b);
- alternative configurations of the proposed Mall, including reductions that diminish or eliminate its "operation[al]" effects and its harm to wetlands, water quality, air quality and other natural resources; and
- the requirements for regional shopping malls set forth in the Conservation and Development Policies Plan, 1987-1992.

RIGHT TO PARTY STATUS AND INTERVENTION

16. In light of the harm to West Farms, its purpose, patrons and employees, and because of the requirements of Con. Gen. Stat Sec. 22a-19 and Conn. Gen. Stat. Sec. 14-311, West Farms Associates seeks to participate formally as a party and to intervene in these proceedings, to give testimony and to submit evidence and legal arguments regarding its position that, for the reasons set forth above and those it intends to set forth at the appropriate time, Wilmorite's STC Application No. 109-8903-01 should be thoroughly reviewed and denied.

17. West Farms Associates, for the reasons set forth above, is substantially, adversely and specifically affected by the roadway and operational proposals set forth in Wilmorite's STC Application.

18. West Farms Associates' participation in the proceedings is in the interests of justice and will not impair the orderly conduct of the proceedings.

19. West Farms Associates is entitled to party status and to intervene under Con. Gen. Stat. Sec. 14-311, Conn. Gen. Stat. Sec. 4-177a(b), Conn. Agencies Regs. Sec. 13b-17-117 and Conn. Gen. Stat. Sec. 22a-19, *Red Hill Coalition, Inc. v. Town Plan and Zoning Commission*, 212 Conn. 727 (1989); *Red Hill Coalition, Inc. v. Conservation Commission*, 212 Conn. 710 (1989); *Cavadini v. STC*, 10 CLT No. 2, Superior Court, Judicial District of Hartford-New Britain at Hartford (September 7, 1983, Purtill, J.); *Connecticut Post Limited Partnership v. State Traffic Commission*, 12 CLT 43, Superior Court, Judicial District of Hartford New Britain at Hartford (September 22, 1986, O'Neill, J.), and fundamental notions of due process.

WHEREFORE, West Farms Associates requests party status and seeks to intervene in this proceeding. It requests that notice of all meetings and hearings that are held in connection with these proceedings, and all information, documents and memoranda submitted to the STC by Wilmorite or other parties or participants, and all information, documents and memoranda prepared by the STC or the various bureaus or individuals within the Department of Transportation, be forwarded to the undersigned, pursuant to Conn. Gen. Stat. Sec. 1-21.

Respectfully submitted,

WEST FARMS ASSOCIATES

By:_____

NEIL T. PROTO, COUNSEL

Connecticut Bar Juris No. 306055

VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND, CHARTERED
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(202) 371-6000

SUSMAN, DUFFY AND SEGALOFF
P. O. Box 1684
55 Whitney Avenue
New Haven, Connecticut 06510
(202) 624-9830

Connecticut Counsel

December 1, 1989

APPENDIX E

MINUTES

SPECIAL MEETING

STATE TRAFFIC COMMISSION

SEPTEMBER 5, 1991

The meeting was called to order in Room 127 of the Department of Transportation, 24 Wolcott Hill Road, Wethersfield at 2:30 p.m.

The purpose of the meeting was consideration of the Application for Certificate filed by Wilmorite, Inc. for the Plainville Mall.

Commissioner Frankel introduced the members of the State Traffic Commission (STC) and advised those in attendance that, although stenographers were present, the official record of the meeting would be these minutes.

Mr. William W. Britnell presented the Traffic Investigation Report recommending the issuance of a Certificate. The recommended improvements, as detailed in the report, were explained to the Commission.

Design waivers necessary for (1) the sightline to the Ramp "C" gore; (2) the sightline from the westbound off-ramp to Crooked Street; (3) the separation of Ramp "X" and adjacent driveway; and (4) the width of the C-D road under Crooked Street were explained. The Commission was advised that, although the Design Waiver Committee had not yet met, the Chairman of the committee had indicated there were no apparent major problems which would prevent approval of the waivers.

It was reported that the generated volume of traffic had been approved by the Bureau of Policy and Planning and that the expressway analyses conducted for the years 1993 and 2010 did not reflect any areas where F level of service would result.

Condition No. 1 of the recommendations, which required the developer to obtain an encroachment permit from the Department of Transportation (DOT) prior to construction of any buildings or foundations were explained. Prior to the encroachment permit being issued, FHWA approval would be required. The environmental issues and studies which may be required would be addressed during that approval process. It would also be necessary for the developer to obtain approvals for breaks in the non-access line and the previously mentioned design waivers prior to the issuance of an encroachment permit.

During the certificate review process, there were areas of concern expressed by residents and by representatives of West Farm Associates. These concerns and their resolution were explained by Mr. Britnell.

The Commission was advised that the developer disagreed with Condition Nos. 11 and 17.

Commissioner Goldberg questioned the specific nature and extent of the design waivers and was advised that each of the waiver requests appeared reasonable and that, if the waivers were not granted, alternate plans would need to be submitted and approved by the STC. The Commission was also advised that alternate plans were considered during the review process, but that operational difficulties became apparent with these plans.

Deputy Commissioner Murty questioned the length of the I-84 eastbound on-ramp and the queuing potential.

Commissioner Frankel emphasized the necessity for further review by the DOT as stipulated in Condition No. 1 and also emphasized the distinction and separateness of the STC and the DOT.

James F. Sullivan, Deputy Commissioner of the Bureau of Highways, explained the implications of Condition No. 1 and discussed the extent of reviews still to be conducted during the encroachment permit process, including review

of additional engineering plans, maintenance and protection of traffic plans, as well as reviews for FHWA approval. He repeated that environmental issues would be addressed during that approval process. He also emphasized the importance of STC action in order to trigger the required additional DOT engineering and administrative actions.

Commissioner Frankel and Deputy Commissioner Sullivan repeated that the environmental issues would be resolved during the encroachment permit process.

In response to questions regarding public input on the waiver requests, Deputy Commissioner Sullivan indicated that this was an internal DOT process which also occurs during the design of state sponsored highway projects.

Commissioner Frankel proceeded to ask for public input, calling upon the developer first, and directed all those wishing to speak to limit their comments to the scope of authority of the STC, namely traffic control and highway safety.

Mr. Alfred W. Friedrich, Senior Vice President of Wilmorite, addressed the Commission regarding the commitments made by major tenants (Macy's, Fox's and Sears) and the financial commitment made by Wilmorite, Inc. Mr. Friedrich was reminded of the necessity to restrict comments to STC issues.

In response to a question from Commissioner Frankel, Mr. Friedrich stated that he fully understood and accepted the provisions of Condition No. 1 and had provided a letter to that effect.

Mr. Marshall C. Hardy of the Sear-Brown Group addressed the Commission on the benefits local drivers and commuters would receive by completion of the proposed improvements. These include safer operation on Crooked Street, direct access to the local street network and improved traffic flows throughout the area. He also repeated

the obligation to complete all the roadway work prior to opening and cited a Town of Plainville restriction on not receiving a Certificate of Occupancy until the roadway work is completed.

Mr. John Bohenko, Town Manager of Plainville, presented a letter in support of the project.

Commissioner Frankel then called on the intervener and again directed that comments be limited to STC issues.

Attorney Neil T. Proto, representing West Farm Associates, inquired as to what questions could be asked and to whom such questions should be directed. He was advised to address the Commission.

Attorney Proto referenced his letters of August 27, 1991, and September 2, 1991, in which he objected to the STC holding a meeting and to the granting of a Certificate to Wilmorite, Inc.

Commissioner Cioffi noted that administrative issues which questioned the legality of the proceedings more appropriately belonged in court.

In response to a question, Attorney Proto was advised that the proceedings were a public meeting.

Attorney Proto read from a prepared statement and addressed the Commission on issues which concerned his client including, Wilmorite's objection to the standard condition (No. 17); the lack of any environmental requirements as suggested by the Council on Environmental Quality; the lack of final Planning and Zoning Commission approval; no condition explicitly citing the necessity for FHWA approval; and the Commission's refusal to comply with Section 22a-19(b).

Commissioner Frankel commented on the difference of interpretation between Attorney Proto and the STC regarding the scope of environmental jurisdiction.

Commissioner Cioffi commented that the Commission's position was consistent with Supreme Court decisions and that environmental issues would be considered by the STC only as they relate to traffic control and highway safety, that is, those issues within the jurisdiction of the STC.

In response to a question, Commissioner Frankel advised Attorney Proto that he could not submit testimony on air pollution from motor vehicles.

In response to Attorney Proto's comments on the physical changes that will affect the land where the improvements are to be made, Commissioner Frankel indicated that such issues would more properly be addressed in the encroachment permit process. He further commented that the appropriate agency for such concerns in DOT and not STC.

Attorney Proto was also advised that the physical effects of the improvements on wetlands, water quality and recreation were not relevant to the STC proceedings.

Commissioner Frankel and Deputy Commissioner Sullivan commented further on the design waivers. Although the DOT waiver committee had not yet met, their position was that the safety of the public was not imperiled in the absence of the certainty of the approvals. The highway design features of the project, which involve waivers and FHWA approvals, are not included in the STC process, but there did not appear to be any fatal flaws in the improvements being recommended.

A discussion followed on the extent of Planning and Zoning approval and Attorney Robin Pearson's August 30, 1991, affidavit.

Mr. Friedrich reported that part of the Plainville Planning and Zoning approval was a stipulation that if roadway networks change, the applicant would return to the Planning and Zoning Commission. The changes referred to are those which would be necessitated by the STC approval.

Mr. Bohenko offered to return with the Town Planner, the Corporation Council and members of the Planning and Zoning Commission to clarify any issues regarding local approvals.Mr. Frank J. Koepke, Senior Vice President of Metro Transportation Group, Inc., addressed the Commission and questioned the lack of analyses of adjacent interchanges; specifically, the I-84/Slater Road Interchange and the Route 72/Corbin Avenue Interchange.

Mr. Britnell referred to the specific pages of the February 1, 1991, Sear-Brown Traffic Study that contained the analyses of those interchanges.

Attorney Proto submitted a summary of his client's position.

Commissioner Frankel indicated willingness to entertain a motion for acceptance of the staff recommendations with Condition Nos. 1-17 as articulated in Traffic Investigation Report No. 109-8903-01.

Upon motion of Commissioner Goldberg, seconded by Commissioner Cioffi, it was so moved.

Following comments from Commissioner Cioffi and Commissioner Goldberg on the necessity in the future to address STC administrative issues such as meetings vs. hearings, aggrieved parties, interveners and appeal procedures, it was unanimously voted to issue a Certificate to Wilmorite, Inc. for Plainville Mall located on Route 372 at Crooked Street stating that the operation thereof will not imperil the safety of the public, referenced to plans prepared by the Sear-Brown Group entitled "Plan for New Britain Avenue-Route 372, Crooked Street, I-84/Route 72 eastbound on-ramp, I-84 eastbound off-ramp, Route 72 eastbound off-ramp, Route 72 westbound Collector/Distributor Road", Sheet Nos. 6 through 47 (Drawing Nos. TS-1 through MISC-10) and 54 through 565 (Drawing No. PL-1 through cross-section Ramp L, Sta. 15+00 to 15+50) dated February 1, 1991, and last revised June 17, 1991,

Drawing Nos. ISD-1 through ISD-15 dated April 15, 1991, and "R.O.W. Location, Overall Site Plan-Mid Level", Drawing No. SE-49 last revised June 25, 1991; and based on the following conditions:

1. That the State Traffic Commission Certificate is conditioned on the developer obtaining a Department of Transportation encroachment permit and the developer will not begin construction of the building, including the foundation of the building, until it has obtained the Department of Transportation encroachment permit.

2. That all of the work shown on the above-referenced plans be performed in substantial conformance with those plans. This work is to include, but not be limited to, the following:

   A. Construction of the Collector-Distributor (C-D) Road from Route 72 and I-84 westbound to Route 372, as shown on Drawing Nos. PL-2A, PL-12, and PL-22 through PL-32.

   B. Modification of the existing Interstate 84 (I-84) and Route 72 westbound exit to Crooked Street and overlap section, as shown on Drawing Nos. PL-12 and PL-27 through PL-32.

   C. Construction of an eastbound on-ramp to I-84 and Route 72 from Crooked Street and realignment and widening of the existing eastbound off-ramp from I-84 to Crooked Street, as shown on Drawing Nos. PL-11 and PL-14 through PL-21.

   D. Construction of a half-diamond interchange providing an off-ramp from Route 72 eastbound to Route 10 and an on-ramp from Route 10 to Route 72 westbound, as shown on Drawing Nos. PL-9, PL-9A, PL-9B, PL-10 and PL-10A.

E. Construction of public roads connection the C-D Road to Route 372 (New Britain Avenue) and Crooked Street, as shown on Drawing No. SE-49.

F. Pavement widening and pavement marking revisions on Route 372 at Route 10, Hooker Street, C-D Road/ Burnham Street, Cooke Street, Local Road #1 (tentative title), Metacomet Road, Driveway #2 and at Crooked Street, as shown on Drawing Nos. PL-1 through PL-8; on Route 10 from Route 372 to Hooker Street/Route 72 westbound off-ramp, as shown on Drawing Nos. PL-1 and PL-10; and on Crooked Street at Route 372, Local Road #2 (tentative title), I-84/Route 72 westbound off-ramp, I-84 eastbound off-ramp/I-84 & Route 72 eastbound on-ramp and at Woodford Avenue/White Oak Avenue, as shown on Drawing Nos. PL-8 and PL-11 through PL-13.

G. Installation or revisions to traffic control signals as follows:
Route 372 at Crooked Street (revision)
Route 372 at Driveway #2 (new)
Route 372 at Metacomet Road (revision)
Route 372 at Local Road #1 (new)
Route 372 at Cooke Street (revision)
Route 372 at C-D Road/Burnham Street (new)
Route 372 at Hooker Street (revision)
Route 372 at Route 10 (revision)
Route 372 at Route 72/Bohemia Street (revision)
Route 10 at Route 72 eastbound off-ramp/Hooker Street (new)
Crooked Street at Woodford Avenue/White Oak Avenue (revision)
Crooked Street at I-84 eastbound off-ramp/I-84 and Route 72 eastbound on-ramp (new)
Crooked Street at I-84 and Route 72 westbound off-ramp (revision)
Crooked Street at Local Road #2/Hotel Driveway (new)

Local Road #1 at Local Road #2 (new)
Separate STC reports will be submitted for approval of the new signal installations and major revisions to existing signals, as defined by the STC.

3. That the State will provide construction inspection and field engineering to be paid for by the developer. The developer will be responsible for construction management.

4. That any Right of Way necessary to satisfy the above conditions be obtained by the applicant and transferred to the State or the Town of Plainville in fee prior to the issuance of an encroachment permit by the Department's District 1 Office.

5. That the STC Certificate is conditioned on the developer requesting and obtaining all required design waivers from the DOT prior to the commencement of construction of the building or any of the roadway improvements.

6. That all required breaks or changes in non-access lines be approved prior to the commencement of construction of the building or any of the roadway improvements.

7. That a computer controlled coordination system be provided to control the signals on Route 372 (New Britain Avenue) from Route 10 to Crooked Street and on Crooked Street from Route 372 to Woodford Avenue/White Oak Avenue. The type of system is to be determined by the DOT.

8. That the developer provide and maintain sightlines as shown on the above-referenced plans at all intersections within the site and along the site frontage.

9. That the developer provide sightlines as shown on the above-referenced plans at all intersections which are being modified by the developer.

10. That the sight distance from any driveway affected by the proposed work not be diminished from what presently exists.

11. That within one year and two years after full occupancy of the development, or earlier if requested by the DOT, the developer take peak hour traffic counts at all intersections providing access to the site from Route 372, Crooked Street or the C-D Road. The developer, upon request by the DOT, will also provide traffic counts at any other location within the scope of study as described in the Report of Findings which are deemed necessary by the DOT.

12. That within one year and two years after full occupancy of the development, or earlier if requested by the DOT, the developer provide traffic counts at the intersection of Route 372 and Colonial Court and Cooke Street to the DOT Office of Traffic Engineering. If the STC deems it necessary to revise the signal at the intersection of Route 372 and Cooke Street to include signalization of Colonial Court, the developer will do so at no cost to the State or the Town of Plainville.

13. That the traffic signal and markings at the intersection of Route 372 at Route 72 and Bohemia Street be revised to provide a double left turn from Route 72 (Forestville Avenue) onto the Route 72 eastbound expressway. A plan showing the signal and marking revisions is to be submitted at a later date for approval by the STC.

14. That the necessary underground conduits for a traffic control signal be installed at the intersection of the proposed C-D Road and the proposed public road connecting the C-D Road to Route 372. Within one year and two years after full occupancy of the development, or earlier if requested by the DOT, the developer will provide traffic counts at this intersection and if the STC deems that a traffic control signal is required,

the developer will install such signal at no cost to the State or the Town of Plainville.

15. That the developer/owner allow future driveway access, from the property at the southeast corner of the development, across mall-owned property to the proposed public road (Local Road #2) in a manner acceptable to the Town of Plainville, subject to suitable indemnification to protect the owner of the property over which the access is secured.

16. That within sixty (60) days of the issuance of the Certificate, a copy thereof together with this report be recorded on the municipal land records in accordance with the attached procedure.

17. That the State Traffic Commission reserves the right to require additional improvements or changes, as deemed necessary, due to the development's traffic in the future. The cost of any additional improvements or changes shall be borne by the owner of the development.

Certificate No. 1111 issued September 5, 1991.

* * * * * * *

Upon motion of Commissioner Frankel, seconded by Commissioner Goldberg, it was so voted to adjourn at 5:05 p.m.

* * * * * * *

LOUIS S. GOLDBERG
Secretary of Commission
Commissioner of Motor Vehicles

WETHERSFIELD, CONNECTICUT
September 5, 1991
Minutes Compiled By:
William W. Stoeckert
Executive Director

(2)

No. 91-1390

Supreme Court, U.S.
FILED
MAR 27 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT WILMORITE, INC.'S BRIEF IN OPPOSITION

JEFFREY J. MIRMAN*
TARLOW, LEVY, & DRONEY, P.C.
74 Batterson Park Road
Farmington, CT 06032
(203) 676-3000
Attorneys for Respondent Wilmorite, Inc.

*Counsel of Record

March 27, 1992

QUESTION PRESENTED

Whether the Court of Appeals' Decision that Petitioner failed to satisfactorily allege a property interest protected by the Fourteenth Amendment in the procedures identified in the Connecticut Environmental Protection Act (CEPA), CONN. GEN. STAT. §22a-19, permitting intervention in State administrative proceedings to raise environmental concerns, is in direct conflict with this Court's holding in *Hewitt v. Helms*, 459 U.S. 460 (1983), that the mandatory duties imposed upon Pennsylvania prison officials for the benefit of individual inmates created a liberty interest protected by the Due Process Clause.

PARTIES TO THE PROCEEDING

The petitioner is West Farms Associates, a Connecticut partnership, the plaintiff and appellant below. Respondents include the State Traffic Commission of the State of Connecticut, the Department of Transportation of the State of Connecticut, J. William Burns and Emil H. Frankel, Bernard R. Sullivan and Nicholas A. Cioffi, and Lawrence F. DelPonte and Louis S. Goldberg, individually and as members of the State Traffic Commission,[1] and Wilmorite, Inc., a New York corporation, the defendants and appellees below.

Pursuant to Rule 29.1 of the Supreme Court Rules, there are no parent or subsidiary companies, except wholly owned subsidiaries, of Respondent Wilmorite, Inc.

---

[1] During the pendency of this action, Respondents Frankel, Cioffi and Goldberg replaced J. William Burns, Bernard R. Sullivan and Lawrence F. DelPonte, respectively.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 6

CONCLUSION 18

APPENDIX A 1a

APPENDIX B 8a

TABLE OF AUTHORITIES

Albany Welfare Rights Org. Day Care Center, Inc. v. Schreck, 463 F.2d 620, 623 (2d Cir. 1972) 4

BAM Historic District Association v. Koch, 723 F.2d 233 (2d Cir. 1983) 8

Board of Regents v. Roth, 408 U.S. 564 (1972) 5

Colorado River Conservation District v. United States, 424 U.S. 800, 814 (1976) 15

Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council, 215 Conn. 474, 484 n. 5, 576 A.2d 510 (1990) 5, 7

Connecticut Fund for the Environment v. Stamford, 192 Conn. 247, 470 A.2d 1214 (1984) 11, 16

Connecticut Water Co. v. Beausoleil, 204 Conn. 38, 48, 526 A.2d 1329 (1987) 10, 11

Dean Tarry Corp. v. Friedlander, 826 F.2d 210 (2d Cir. 1987) 8

Doyle v. The Commissioner of Environmental Protection, 3 Conn. L. Rptr. 603, 605 (Sup. Ct. 1991) 17

E.I. DuPont De Nemours & Co., Inc. v. Culich, 791 F.2d 5, 7 (1st Cir. 1986) 13

Fusco v. State of Connecticut, 815 F.2d 201 (2d Cir. 1987). *cert. denied* 484 U.S. 849 (1987) 8

Hewitt v. Helms, 459 U.S. 460 (1983) 6, 7, 15

Lawn v. U.S., 355 U.S. 339, 365 (1958) 3

Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) 7

Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 n.8 (1979) 9

Manchester Environmental Commission v. Stockton, 184 Conn. 51, 441 A.2d 68 (1981) 9, 10, 17

Middletown v. Hartford Electric Light Co., 192 Conn. 591, 597, 473 A.2d 787 (1984) 10-12, 16

Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 285 (1984) 9

Morrissey v. Brewer, 408 U.S. 471, 477 (1972) 3

NCAA v. Tarkanian, 488 U.S. 179, 191 (1983) 18

Negrich v. Horn, 379 F.2d 213, 215 (3d Cir. 1967) 4

New Haven Inclusion Cases, 399 U.S. 392, 450 n. 66 (1970) 3

PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 29-30 (1st. Cir.), *cert. granted in part*, ___ U.S. ___, 112 S.Ct. 414 (1991) 8, 9

Railroad Comm'n of Texas v. Pullman Company, 312 U.S. 496, 501 (1941) 15

Red Hill Coalition v. Town Plan and Zoning Commission, 212 Conn. 727, 563 A.2d 1347 (1989) 12

RRI Realty Corp., Inc. v. Village of South Hampton, 870 F.2d 911 (2d Cir. 1989) 8

Salahuddin v. Cuomo, 861 F.2d 40 (2d Cir. 1988) 4

Walls v. Planning and Zoning Commission, 176 Conn. 475, 408 A.2d 243 (1979) 5

Statutes:

CONN. GEN. STAT. §14-311 . . . . . *passim*

CONN. GEN. STAT. §22a-16 . . . . . *passim*

CONN. GEN. STAT. §22a-19 . . . . . *passim*

Law Reviews and Treatises:

Note, *Public Trust, Farmland Protection, and the Connecticut Environmental Protection Act: Red Hill Coalition, Inc. v. Town Plan & Zone Commission*, 23 Conn. L. Rev. 811, 818 (1991) 16

Sax, *The Public Trust Doctrine and Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 556 (1970) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1390

WEST FARMS ASSOCIATES, INC.

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

RESPONDENT WILMORITE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Wilmorite, Inc. respectfully requests that this Court deny the petition of West Farms Associates for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion below of the Court of Appeals is reported at 951 F.2d 469. The judgment and opinion of the District Court for the District of Connecticut are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1991. The Petitioner has asserted that jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Fourteenth Amendment to the United States Constitution and Section 22a-19 of the Connecticut General Statutes reproduced at page 34a of the Petitioner's petition, the First Amendment to the United States Constitution and Section 4-166, Section 4-183, Section 14-311 and Section 22a-16 of the Connecticut General Statutes -- CONN. GEN. STAT. §4-166, CONN. GEN STAT. §4-183, CONN. GEN. STAT. §14-311 and CONN. GEN. STAT. §22a-16 -- reproduced at Appendix A, pp. 1a-7a, *infra*, are involved in this matter.

STATEMENT OF THE CASE

Introduction

This case concerns the attempt by the Petitioner West Farms Associates, owner of West Farms Mall in West Hartford and Farmington, Connecticut, a one million square foot shopping mall, to impede or block the efforts of an economic competitor, Respondent Wilmorite, Inc. ("Wilmorite"), to develop a similarly sized shopping mall approximately six miles away in Plainville, Connecticut. In this case, Petitioner chose to intervene in the processing of Wilmorite's application for a certificate from the

Connecticut State Traffic Commission ("STC"), invoking intervention rights found in the Connecticut Environmental Protection Act ("CEPA"). Petitioner has complained about the way in which Wilmorite's application has been processed, notwithstanding that Petitioner initiated the same procedures in seeking, and obtaining, two certificates from the STC prior to the construction and later expansion of West Farms Mall.

The Petition Includes Non-Record Facts

The facts of this case are adequately outlined in the decision of the Court of Appeals. Petitioner, however, has sought to include in its Petition allegations of fact which were neither included within Petitioner's Amended Complaint nor included as part of the Record before either the District Court or the Court of Appeals. We will identify and respond to those non-Record factual allegations.[2]

At page 10, paragraph 6 of its Petition, West Farms discusses events which occurred at a special meeting of the STC held on September 5, 1991. Neither the District Court nor the Court of Appeals had before it any consideration of the events of this meeting or the resultant decision to issue the Certificate made by the STC.

In the same paragraph, and again at page 14, n. 9, West Farms alleges: "No evidence was introduced to refute

---

[2] This Court has repeatedly held that it will not consider any evidence which is not contained within the Record below. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n. 66 (1970); *Lawn v. U.S.*, 355 U.S. 339, 365 (1958).

or contradict West Farms [sic] verified pleadings." In fact, there was significant and substantial evidence in the record before the STC, provided to West Farms prior to the STC meeting of September 5, 1991, which rebutted or contradicted the allegations of environmental harm contained within West Farms' Verified Petition.[3]

At page 7 of its Petition, West Farms asserts that it petitioned to intervene in the STC's proceeding because it was concerned, *inter alia*, about "its own environmental and legal duties as a Certificate holder, traffic generator, and corporate citizen." In the same paragraph West Farms asserts that its "intervention petition noted the particularized environmental effects Wilmorite's proposal would have on West Farms itself." However, neither the Amended Complaint nor the intervention petition contained such information; rather, the Amended Complaint and the Intervention Petition included no more than statements of generalized fears.[4] The only particularized effects West

---

[3] West Farms attached its Verified Petition to the Amended Complaint filed on or about July 25, 1990. All respondents filed motions, pursuant to F.R.C.P. 12(b)(6), to dismiss West Farms' Amended Complaint, and for purposes of the record in the District Court and the Court of Appeals the allegations of West Farms' Amended Complaint were deemed to be true.

[4] A number of courts have recognized that mere notice pleading, or conclusory allegations, are insufficient to state a claim under which relief can be granted under 42 U.S.C. §1983. *Albany Welfare Rights Org. Day Care Center, Inc. v. Schreck*, 463 F.2d 620, 623 (2d Cir. 1972) *cert. denied*, 410 U.S. 944 (1973); *Negrich v. Horn*, 379 F.2d 213, 215 (3d Cir. 1967); *Salahuddin v. Cuomo*, 861 F.2d 40 (2d Cir. 1988).

(continued...)

Farms noted were its concerns about lost income due to a decline in its gross sales.

The Statutory Framework

Pursuant to CONN. GEN. STAT. §14-311, persons seeking to build a shopping center generating large volumes of traffic which has an exit or entrance on or substantially affects state highway traffic must obtain a certificate from the STC that the operation will not imperil the safety of the public. CONN. GEN. STAT. §14-311(a). "In determining the advisability of such certification, the state traffic commission shall include, in its consideration, highway safety, the width and character of the highways affected, the density of traffic thereon and the character of such traffic." CONN. GEN. STAT. §14-311(d).

---

[4](...continued)

Moreover, generalized fears do not give rise to specific personal or legal interests, and, as such, no property interest can be grounded on such generalized fears. *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council*, 215 Conn. 474, 576 A.2d 510 (1990); *Walls v. Planning and Zoning Commission*, 176 Conn. 475, 408 A.2d 243 (1979); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

ARGUMENT

Reasons Why The Court Should Deny West Farms' Petition For Certiorari

1. *The Decision of the Court of Appeals Is Not In Conflict With This Court's Decision In* ***Hewitt v. Helms.***

The Court of Appeals considered Petitioner's argument that *Hewitt v. Helms* mandated a different result and rejected that claim. As the Court of Appeals found:

> [U]nlike Section 22a-19(b), the statute at issue in *Hewitt* imposed mandatory duties on Pennsylvania prison officials for the benefit of individual inmates. The officials were thus required to follow certain guidelines before removing an inmate from the general prison population and placing that inmate in close or maximum administrative custody. Id. at 470 n.6. The Court held that the prison inmates had a liberty interest protected by the Due Process Clause as a result of this Pennsylvania statutory scheme. Id. at 471-72.
>
> Section 22a-19(b), as noted, neither specifies any particular action or non-action nor confers any individualized benefit. Although it accords intervenors the procedural right to be heard on the environmental effects of a development, the STC's decision is largely of a judgmental and discretionary nature.[5] Moreover,

---

[5] Unlike *Hewitt*, CEPA's mandatory language is far more generalized; it merely requires the administration agency to consider all (continued...)

> the intended beneficiaries of Section 22a-19(b) are entirely generalized, including anyone who might encounter unreasonable environmental consequences as a result of the particular development. Such universal benefits are not property interests protected by the Due Process Clause. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (the hallmark of property, the Court has emphasized, is an *individual* entitlement grounded in state law.) (emphasis added).

951 F.2d at 472-473; (Petition, App. A, pp. 6a-7a).

Indeed, the Connecticut Supreme Court has specifically reserved for another day the issue of whether CEPA "would confer such property rights in the absence of a showing of any specific personal or legal interest in the subject matter of the proceedings at issue." *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council*, 215 Conn. 474, 484, n. 5, 576 A.2d 510 (1990). Given that the Supreme Court of the State of Connecticut has not deemed the issue to be sufficiently important to require resolution, there is no reason why this Court should consider this issue, arising out of a state statute, sufficiently important to justify resolution now.

---

[5](...continued)
relevant surrounding circumstances and factors before issuing the certificate. A careful procedural structure does not in and of itself create a protected liberty interest. 459 U.S. at 471. Moreover, the STC is vested with considerable discretion over whether to issue the Certificate at all; no such discretion was present in the administrative process in *Hewitt*.

Furthermore, as the Court of Appeals reasoned, CONN. GEN. STAT. §22a-19 does no more than provide an intervenor with an opportunity to present its views as to environmental impacts. 951 F.2d at 472 (Petition, App. A, p. 6a). Since the decision to issue a certificate lies within the STC's discretion, providing West Farms with an opportunity to be heard is nothing more than a procedural right. Id.[6]

---

[6] *See also*, *Fusco v. State of Connecticut*, 815 F.2d 201 (2d Cir. 1987). *cert. denied* 484 U.S. 849 (1987); *BAM Historic District Association v. Koch*, 723 F.2d 233 (2d Cir. 1983).

Furthermore, the argument that West Farms has a protected property interest in the application process before the STC when the applicant itself (Wilmorite) has no such property interest makes no sense. Section 14-311 vests the STC with discretion as to whether or not to issue the certificate. Because there is no certainty an application will be granted, no property interest can be said to exist. *Yale Auto Parts v. Jones*, 758 F.2d 54 (2d Cir. 1985); *Dean Tarry Corp. v. Friedlander*, 826 F.2d 210 (2d Cir. 1987); *RRI Realty Corp., Inc. v. Village of South Hampton*, 870 F.2d 911 (2d Cir. 1989).

Thus, if any party can look for comfort in this Court's decision to accept certiorari in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 29-30 (1st. Cir.), *cert. granted in part*, ___ U.S. ___, 112 S.Ct. 414 (1991) it should be Wilmorite, and not West Farms. West Farms' reliance upon the granting of certiorari (Petition, p. 10, n.7; p. 20, n. 11) is misplaced. In *PFZ* this Court granted certiorari only as to the following question: "Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. §1983." While Wilmorite, as the developer of the Plainville Mall, might therefore have had substantive due process claims arising out of a denial by the STC of its application, this Court's resolution of *PFZ* can have no bearing on the claims advanced by West Farms. Accordingly, West Farms'

(continued...)

In any event, West Farms was awarded, and took, the opportunity to present its views. West Farms had no right to anything more. The First Amendment authorizes the STC to conduct business in private. *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1979). Moreover, there is no constitutional requirement that government policymakers, including the members of the STC, listen or respond to these claims. *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984); 951 F.2d at 473.

West Farms, however, has consistently attempted to transform the process by which the STC reviews applications under CONN. GEN. STAT. §14-311. Contrary to the assertion of West Farms before the District Court, the Court of Appeals, and here (Petition, p. 14), the mere intervention by a party under Section 22a-19 does not transform the administrative processing of an application into a contested case proceeding within the meaning of Section 4-166(2) of the Connecticut Administrative Procedure Act. The shifting of burdens (first to a plaintiff to demonstrate a *prima facie* case, then to defendants to produce evidence to the contrary or to show there are no reasonable alternatives) takes place, if at all, only in direct actions commenced in the Superior Court under Section 22a-16. In *Manchester Environmental Commission v. Stockton*, 184 Conn. 51, 441 A.2d 68 (1981), the Court evaluated claims made under Section 22a-16, and not under Section 22a-19. West Farms' reliance upon *Stockton* is, therefore, misplaced.

---

[6](...continued)
request (Petition, p. 20) that this Court hold in abeyance a writ of certiorari pending resolution of *PFZ* should be denied.

An intervenor's standing under Section 22a-19 is limited to the claims already raised in the proceeding within the jurisdiction of the agency. *Middletown v. Hartford Electric Light Co.*, 192 Conn. 591, 597, 473 A.2d 787 (1984).

> [An intervenor] has a derivative role by virtue of an action already shaped by the original parties. He takes the controversy as he finds it and may not introduce his own claims to restyle the action.

Connecticut Water Co. v. Beausoleil, 204 Conn. 38, 48, 526 A.2d 1329 (1987).

Finally, the Court of Appeals concluded that the First Amendment does not require a right of access to the Courts so as to require the STC to keep a public record of any *ex parte* meetings. 951 F.2d at 474.

West Farms has not challenged any of these conclusions which rejected the very bases upon which West Farms contended in the courts below it was deprived of its property interests without due process. Thus, even if West Farms had some protected property interest, it has not seen fit to challenge the lower court's findings that, in effect, West Farms received all the process it was due.

2. *The Petition Seeks to Expand the Jurisdiction of the STC Beyond its Legislative Mandate.*

West Farms argues, at page 14 of its Petition, that the STC was precluded from disregarding West Farms' claim of environmental harm to the land at the site of the proposed roadway changes, the air pollution generated by 40,000 to 50,000 additional motor vehicle trips daily, and of the effect

of the proposed changes upon nearby wetlands. West Farms claims that the STC was obligated to assume as true the allegations of the petition until rebutted.

However, even assuming, *arguendo*, the truth of Petitioner's allegations, the STC was without jurisdiction to consider West Farms' claims. The Connecticut Supreme Court, in ruling upon the parameters of a state agency's authority under CONN. GEN. STAT. §22a-19, has specifically ruled that state agencies are not to be considered mini-environmental protection agencies, *Connecticut Fund for the Environment v. Stamford*, 192 Conn. 247, 470 A.2d 1214 (1984), and the powers of an agency are not expanded by CONN. GEN. STAT. §22a-19. *Beausoleil*, 204 Conn. at 38, 526 A.2d at 1329; *Middletown*, at 591, 473 A.2d at 787. Accordingly,

> ...invocation of the EPA is not an open-sesame for standing to raise environmental claims with regard to any and all environmental legislation. In *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, we held that Section 22a-19 of the EPA, which permits any person, on the filing of a verified pleading, to intervene in any administrative proceeding and to raise therein environmental issues must be read in connection with the legislation which defines the authority of the particular administrative agency. Section 22a-19 is not intended to expand the jurisdictional authority of an administrative body whenever an intervenor raises environmental issues. Thus, an inland-wetland agency is limited to considering environmental matters which impact on inland-wetlands. Other environmental impacts must be raised before other appropriate administrative

> bodies, if any, or in their absence, by the institution of an independent action pursuant to Section 22a-16.

Id. at 597, 473 A.2d at 787.

Under CONN. GEN. STAT. §14-311, the STC's responsibility is limited to

> highway safety, the width and character of the highways affected, the density of traffic thereon, the character of such traffic and the opinion and findings of the traffic authority of the municipality wherein the development is located.

CONN. GEN. STAT. §14-311(d). The STC's concern over environmental matters, then, is limited to the effects of the proposed roadway changes on the flow of traffic over those roadways. It is concerned with air pollution only insofar as such pollution would affect the flow of traffic. The STC is powerless to consider any alleged harm to the land at the site of the roadway changes, or to nearby wetlands, or to air pollution in general, all of which are unquestionably beyond the agency's expertise.[7] Under these circumstances, West Farms should have raised the issue of any environmental impacts in an independent action pursuant to CONN. GEN. STAT. Section 22a-16. *See Middletown*, 192 Conn. at 597, 473 A.2d at 787. That West Farms chose not to bring such an action suggests an inability by West Farms to demonstrate a *prima facie* case of unreasonable pollution,

---

[7] It is, furthermore, not clear that the environmental effects to the land at the site of the proposed roadway changes would involve the "natural resources of the state." Cf. *Red Hill Coalition v. Town Plan and Zoning Commission*, 212 Conn. 727, 563 A.2d 1347 (1989).

and illustrates that its motives are not to protect the Public Trust, but its own economic interests.[8]

3. *The Petitioner Has State Court Judicial Remedies Available Which Have Been Invoked.*

This Court should also deny West Farms' Petition because alternative state court procedures are available to West Farms, in addition to the direct action provision of CONN. GEN. STAT. §22a-16. This Court may take judicial notice of West Farms' Appeal from the grant by the STC to Wilmorite of the Section 14-311 certificate bearing Docket No. CV910502822S(A90). *See generally*, *E.I. DuPont De Nemours & Co., Inc. v. Culich*, 791 F.2d 5, 7 (1st Cir. 1986) and cases cited therein. In its State Court Appeal, reproduced as Appendix B beginning at page 8a, *infra*, West Farms makes many of same allegations as set forth in its Amended Complaint to the District Court, including, *inter alia*,

a. that the STC failed to provide West Farms with procedures governing its intervention or participation in the Wilmorite application process (¶11);

---

[8] West Farms' suggestion, at page 20, n. 10 "that the vigorous use of private sector values to protect public trust resources is precisely what §22a-19(b) of CEPA requires in order to further its purpose" is not supported by either case law or the legislative history. The purpose of the legislation is to prevent unreasonable pollution, not to protect West Farms' income derived from gross sales, which is why the Court of Appeals correctly concluded that the intended beneficiaries of §22a-19 are entirely generalized, and that the inability of West Farms to explain its particularized harm results in the absence of a protected property interest. 951 F.2d at 472-473. (Petition, App. A, pp. 6a-7a).

b. that the STC had *ex parte* communications with Wilmorite and others supportive of the application, discussing the feasibility of the application (¶12);

c. that the STC excluded West Farms from participating in the review process (¶14);

d. that the STC denied West Farms the opportunity to present testimony showing the claimed environmental harm from the Plaintiff Mall and the roadway improvements (¶22); and

e. that the STC's issuance of a certificate to Wilmorite violated due process, was made pursuant to unlawful procedures and contrary to statutory duty, because (1) West Farms was deprived of the opportunity to meaningfully participate, (2) of the inability to establish a record for adequate judicial review, (3) of the absence of substantive standards, and (4) of the *ex parte* contacts (¶31).

Thus, West Farms has raised in the State Court proceedings the same issues which it seeks to have this Court consider upon appeal. Inasmuch as West Farms makes no suggestion that the Connecticut courts cannot adequately protect West Farms' interests, there is no reason why this Court should consider these issues before the Connecticut courts have had an opportunity to resolve issues arising out of state law *Colorado River Conservation District v. United States*, 424 U.S. 800, 814 (1976). *Railroad Comm'n of Texas v. Pullman Company*, 312 U.S. 496, 501 (1941).

4. *West Farms Raises, For The First Time, A Claim That Invocation Of The Public Trust Doctrine Requires Federal Judicial Intervention.*

Ancillary to West Farms' argument that *Hewitt v. Heims* requires a conclusion that plaintiffs have a property interest by virtue of Section 22a-19 is West Farms' claim that the "Public Trust Doctrine" of CEPA also establishes a mandatory duty on the part of an administrative agency (Petition, p. 15, ¶6.8).[9] West Farms argues that the Court of Appeals overlooked the meaning or significance of the Public Trust Doctrine. West Farms further argues that the evolution of the doctrine under state law warrants review by this Court.

However, if the Court of Appeals overlooked the significance of the Public Trust Doctrine, it was because West Farms failed to bring the Doctrine to the Court's attention. West Farms argues, for the first time before this Court and without raising this claim below, that the Public Trust Doctrine imposes mandatory duties upon state agencies. In so arguing, West Farms incorrectly assumes that the Public Trust Doctrine has been universally applied and has the same meaning in Connecticut that it has in Michigan, California, or South Dakota. Moreover, as West Farms recognizes, the Public Trust Doctrine was traditionally applied only to tidal or navigable waters. Sax, *The Public Trust Doctrine and Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 556

---

[9] Although West Farms has identified two questions presented, the text of the Petition reveals that the second question is merely ancillary to the first, which is why we identified only one question as being presented.

(1970). While it may be that the Connecticut legislature has expanded the doctrine beyond tidal or navigable waters, the terms "public trust" and "other natural resources" have not been defined or interpreted, either in CEPA's legislative history or by judicial interpretation. *See generally*, Note, *Public Trust, Farmland Protection, and the Connecticut Environmental Protection Act: Red Hill Coalition, Inc. v. Town Plan & Zone Commission*, 23 Conn. L. Rev. 811, 818 (1991). Furthermore, as we have indicated previously, an intervenor in an administrative proceeding under CONN. GEN. STAT §22a-19 is not permitted to expand the scope of either the jurisdiction of the agency involved in the proceeding or the issues existing in that proceeding at the time of intervention. *Middletown*, 192 Conn. at 597, 473 A.2d at 787; *Connecticut Fund*, 192 Conn. at 247, 470 A.2d at 1214.

West Farms' argument that because CEPA confers standing to sue under CONN. GEN. STAT. §22a-16[10], it must be considered to have some "individualized benefits", or a distinct injury. Again, even assuming, *arguendo*, this to be true, Connecticut courts have specifically held that §22a-19 does not confer upon intervenors in administrative proceedings the right to appeal decisions of administrative agencies, in the absence of some independent statutory provisions authorizing such appeals. *See, e.g., Doyle v. The Commissioner of Environmental Protection*, 3 Conn. L. Rptr. 603, 605 (Sup. Ct. 1991). The Connecticut Supreme Court has not ruled on the issue of whether §22a-19 creates a right of appeal under the Connecticut Administrative

---

[10] Of course, "standing is not a matter of constitutional law in Connecticut..." *Stockton*, 184 Conn. at 65.

Procedure Act in the absence of an independent statutory right of appeal.

The interpretation of the requirements for provisions of state law are best decided by state courts, particularly where, as here, state law questions bearing on policy problems of substantial public import at issue. *Colorado River Conservation District*, 424, at 814. West Farms has access to expeditious and adequate state court review of its claims. Therefore, this Court should abstain from interpreting the state statutory scheme. Id.

5. *The Decision Of The Court Of Appeals Was Correct For Other Reasons.*

As the District Court held, Wilmorite is a private party. The District Court further held that West Farms' Amended Complaint did not allege Wilmorite to have so intertwined itself with the STC so as to become indistinguishable from the STC or that in participating in the CONN. GEN. STAT §14-311 application process Wilmorite assumed responsibilities reserved for the STC and State Officials. The District Court, relying, *inter alia*, upon this Court's holding in *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1983), concluded that Wilmorite's conduct did not constitute state action, and granted Wilmorite's Motion To Dismiss (Petition, p. 20a).

The Court of Appeals concluded it did not need to address this issue (Petition, p. 10a). Nevertheless, the analysis of the District Court was sound, and would have provided ample basis for the Court of Appeals to affirm.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Jeffrey J. Mirman, Esq.
Counsel of Record
TARLOW, LEVY & DRONEY, P.C.
74 Batterson Park Road
P.O. Box 887
Farmington, CT 06034
(203) 676-3000

Counsel for Respondent
Wilmorite, Inc.

March 27, 1992

No. 91-1390

In The

Supreme Court of the United States

October Term, 1991

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 14-311 of the Connecticut General Statutes provides:

§14-311. **Open air theaters, shopping centers and certain other developments affecting state highway traffic**

(a) No person, firm, corporation, state agency, or municipal agency or combination thereof shall build, expand, establish or operate any open air theater, shopping center or other development generating large volumes of traffic, having an exit or entrance on, or abutting or adjoining, any state highway or substantially affecting state highway traffic within this state until such person or agency has procured from the state traffic commission a certificate that the operation thereof will not imperil the safety of the public.

(b) No local building official shall issue a building or foundation permit to any person, firm, corporation, state

agency or municipal agency to build, expand, establish or operate such a development until the person, firm, corporation or agency provides to such official a copy of the certificate issued under this section by the commission. If the commission determines that any person, firm, corporation or state or municipal agency has (1) started building, expanding, establishing or operating such a development without first obtaining a certificate from the commission or (2) has failed to comply with the conditions of such a certificate, it shall order the person, firm, corporation or agency to (A) cease constructing, expanding, establishing or operating the development or (B) comply with the conditions of the certificate within a reasonable period of time. If such person, firm, corporation or agency fails to (i) cease work or (ii) comply with an order of the commission within such time as specified by the commission, the commission may make an application to the superior court for the judicial district of Hartford-New Britain or the judicial district where the development is located enjoining the construction, expansion, establishment or operation of such development.

(c) The state traffic commission shall issue its decision on an application for a certificate under subsection (a) of this section not later than one hundred twenty days after it is filed, except that, if the commission needs additional information from the applicant, it shall notify the applicant in writing as to what information is required and (2) the commission may toll the running of such one-hundred-twenty-day period by the number of days between and including the date such notice is received by the applicant and the date the additional information is received by the commission and (2) if the commission receives the additional information during the last ten days of the one-hundred-twenty-day period and needs additional

time to review and analyze such information, it may extend such period by not more than fifteen days. The state traffic commission may also, at its discretion, postpone action on any application submitted pursuant to this section or section 14-311a until such time as it is shown that an application has been filed with and approved by the municipal planning and zoning agency or other responsible municipal agency.

(d) In determining the advisability of such certification, the state traffic commission shall include, in its consideration, highway safety, the width and character of the highways affected, the density of traffic thereon, the character of such traffic and the opinion and findings of the traffic authority of the municipality wherein the development is located. If the state traffic commission determines that traffic signals, pavement markings, channelization, pavement widening or other changes or traffic control devices are required to handle traffic safely and efficiently, one hundred percent of the cost thereof shall be borne by the person building, establishing or operating such open air theater, shopping center or other development generating large volumes of traffic, except that such cost shall not be borne by any municipal agency. The commissioner of transportation may issue a permit to said person to construct or install the changes required by the state traffic commission.

(e) Any person aggrieved by any decision of the state traffic commission hereunder may appeal therefrom in accordance with the provisions of section 4-183, except venue for such appeal shall be in the judicial district in which it is proposed to operate such establishment. The provisions of this section except insofar as such provisions relate to expansion shall not apply to any open air theater,

shopping center or other development generating large volumes of traffic in operation on July 1, 1967.

3. Section 22a-16 of the Connecticut General Statutes provides:

§22a-16 **Action for declaratory and equitable relief against unreasonable pollution**

The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action s hall be brought in the judicial district of Hartford-New Britain, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of he public trust of the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.

4. Section 4-183 of the Connecticut Administrative Procedure Act provides, in pertinent part:

§4-183. **Appeal to superior court**

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the superior court as

provided in this section. The filing of a petition for reconsideration is not a prerequisite to the filing of such an appeal.

(b) A person may appeal a preliminary, procedural or intermediate agency action or ruling to the superior court if (1) it appears likely that the person will otherwise qualify under this chapter to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy.

. . .

(g) Within thirty days after the service of the appeal, or within such further time as may be allowed by the court, the agency shall transcribe any portion of the record that has not been transcribed and transmit to the reviewing court the original or a certified copy of the entire record of the proceeding appealed from, which shall include the agency's findings of fact and conclusions of law, separately stated. By stipulation of all parties to such appeal proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(h) If, before the date set for hearing on the merits or an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The

agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(i) The appeal shall be conducted by the court without a jury and shall be confined to the record. If alleged irregularities in procedure before the agency are not shown in the record or if facts necessary to establish aggrievement are not shown in the record, proof limited thereto may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(j) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment.

(1988), P.A. 88-230, § 1; 1988, P.A. 88-317, § 23, eff. July 1, 1989; 1990, P.A. 90-98, § 1.)

5. Section 4-166 of the Connecticut Administrative Procedure Act provides, in pertinent part:

§4-166 **Definitions**

. . .

(2) "Contested case" means a proceeding, including but not restricted to rate-making, price fixing and licensing, in which the legal rights, duties or privileges of a party are required by statute to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held, but does not include proceedings on a petition for a declaratory ruling under section 4-176, or hearings referred to in section 4-168;

(3) "Final decision" means (A) the agency determination in a contested case, (B) a declaratory ruling issued by an agency pursuant to section 4-176, or (C) an agency decision made after reconsideration. The term does not include a preliminary or intermediate ruling or order of an agency, or a ruling of an agency granting or denying a petition for reconsideration;

. . .

APPENDIX B

RETURN DATE: Nov. 19, 1991	:	SUPERIOR COURT
WEST FARMS ASSOCIATES	:	JUDICIAL DISTRICT
VS.	:	OF HARTFORD/ NEW BRITAIN
CONNECTICUT STATE TRAFFIC COMMISSION	:	AT HARTFORD
and WILMORITE, INC.,	:	OCTOBER 15, 1991

TO ANY PROPER OFFICER, GREETING:

BY AUTHORITY OF THE STATE OF CONNECTICUT you are hereby commanded to summon the State Traffic Commission of the State of Connecticut, 24 Wolcott Hill Road, Wethersfield, Connecticut and Wilmorite, Inc., 1265 Scottsville Road, Rochester, New York to appear before the Superior Court within and for the Judicial District of Hartford/New Britain at Hartford on the third Tuesday of November, 1991, the appearance not to be in person but to be made by State Traffic Commission and Wilmorite, Inc. or its attorney by filing a written statement of appearance with the Clerk of the Court whose address is 95 Washington Street, Hartford, Connecticut 06106 on or before the second day following the return date then and there to answer unto West Farms Associates of 200 East Long Lake, Bloomfield Hills, Michigan in an administrative appeal by serving upon the State Traffic Commission and Wilmorite, Inc. a true and attested copy of this citation and the administrative appeal in the manner prescribed by law.

Maria M. Kowal, 55 Whitney Avenue, New Haven, Connecticut 06510, is recognized in a sufficient amount of $250.00 to prosecute, etc.

HEREOF FAIL NOT but due service return and make.

DATED at New Haven, Connecticut this day of October, 1991.

JAMES J. PERITO
Commissioner of the Superior Court

NEIL T. PROTO
Commissioner of the Superior Court

Please enter the appearance of
Susman, Duffy & Segaloff, P.C.
55 Whitney Avenue, p. 0. Box 1684
New Haven, Connecticut 06507
624-9830
Juris #62505

Verner, Liipfert, Bernhard, McPherson
and Hand, Chartered
901 15th Street, N.W.
Suite 700
Washington, D. C. 20005
(202) 371-6196
Juris #306055

for the plaintiff in this action

RETURN DATE: Nov. 19, 1991	:	SUPERIOR COURT
WEST FARMS ASSOCIATES	:	JUDICIAL DISTRICT
VS.	:	OF HARTFORD/ NEW BRITAIN
CONNECTICUT STATE TRAFFIC COMMISSION	:	AT HARTFORD
and WILMORITE, INC.,	:	OCTOBER 15, 1991

APPEAL FROM FINAL DECISION OF THE CONNECTICUT STATE TRAFFIC COMMISSION

TO THE SUPERIOR COURT for the Judicial District of Hartford/New Britain at Hartford to be held on the third Tuesday of November, 1991 comes the plaintiff West Farms Associates ("West Farms") appealing the decision of the Connecticut State Traffic Commission (the "STC") dated September 5, 1991 to issue Wilmorite, Inc. ("Wilmorite") a traffic certificate pursuant to Conn. Gen. Stat. Section 14-311 for the construction of the proposed Plainville Mall (the "Plainville Mall") and complains and says:

A. Parties

1. Plaintiff West Farms is a partnership organized under the laws of the State of Connecticut. West Farms owns the West Farm Malls, a one million square foot regional shopping mall located on a boundary line between West Hartford, Connecticut and Farmington, Connecticut adjacent to Interstate 84 ("I-84").

2. Defendant STC is a state agency located within the Connecticut State Department of Transportation. The

STC is composed of the Commissioners of the Connecticut State Departments of Transportation, Safety and Motor Vehicles. The STC is responsible for the issuance of certificates to shopping centers and other developments pursuant to Conn. Gen. Stat. Sec. 14-311 et seq.

3. Defendant Wilmorite is a New York corporation located at 1265 Scottsville Road, Rochester, New York.

B. Jurisdiction

4. This appeal is brought pursuant to Conn. Gen. Stat. Sec. 14-311(e) which provides that an aggrieved person may appeal from a decision of the STC and pursuant to the Connecticut Administrative Procedures Act, Conn. Gen. Stat. Sec. 4-183.

C. The STC Proceeding

5. On or about March 27, 1989, Wilmorite submitted its application and related materials to the STC relating to its proposed construction of the Plainville Mall ("Wilmorite Application"). Wilmorite proposed to build a 1.3 million square feet mall, one of the largest shopping malls in Connecticut, adjacent to the I-84 and the Route 72 corridor in Plainville, approximately 6 miles from the West Farms Mall.

6. To accommodate the substantial increases in traffic which the Plainville Mall will generate, the Wilmorite application proposed significant roadway changes to road proximate to I-84, Route 72, Route 10 and Route 372 (New Britain Avenue), including the construction of new on and off ramps to Route 72.

7. On December 1, 1989, West Farms submitted its "Verified Petition for Designation as a Party and Notice of Intervention" in Wilmorite's application review, STC No. 109-8903-01, ("Petition") pursuant to the Shopping Centers Traffic Act, Conn. Gen. Stat. S+c. 14 311, the Connecticut Environmental Protection Act, Conn. Gen. Stat. Sec. 22a-19, and various other statutory and regulatory provisions.

8. In its Petition, West Farms identified its purpose, interests and location within the same trade area as Wilmorite's proposed mall; set forth the various direct, indirect and cumulative environmental, land-use, traffic, and safety consequences that Wilmorite's proposal will generate at the site, in the region, along the I-84/Route 72 corridor, and with respect to West Farms; described the STC's procedural deficiencies and the absence of substantive environmental and safety standards; requested notice of all meetings and hearings that are held in connection with the STC proceedings; and requested all information at the STC and Connecticut Department of Transportation on Wilmorite's Application.

9. Without notice to West Farms and without any opportunity for West Farms to present testimony in support of its Petition or to answer any questions about West Farms' interests, position or viewpoint, the STC convened a meeting on December 19, 1989 to consider West Farms' Petition.

10. Thereafter, by letter dated January 11, 1990, the STC informed West Farms that its Petition was granted under the Connecticut Environmental Protection Act, Conn. Gen. Stat. Sec. 22a-19(a) "solely for the purpose of raising

environmental issues relevant to the issuance of a certificate under Section 14-311 of the General Statutes."

11. The STC, which has no rules and regulations defining the rights and duties of intervenors, did not provide West Farms with any procedures governing its intervention or its participation in the Wilmorite Application process.

12. During the course of the consideration of Wilmorite's application, the STC held numerous ex parte communications with Wilmorite, its consultants, its lawyers and representatives from the Town of Plainville who were supportive of Wilmorite's application. Upon information and belief, these ex parte communications included discussions and the making by the STC of decisions concerning the methodology used by Wilmorite to determine traffic increases and characteristics, safety risks, modifications and the feasibility of the Wilmorite Application, including proposed roadway changes.

13. The STC has no rules or regulations governing such ex parte communications; nor does the STC have any means for making such ex parte communications part of the public or judicial record.

14. Although Conn. Gen. Stat. Sec. @4-311 requires the STC to issue its decision on an application for a traffic certificate within 120 days after such application is filed, the STC engaged in its review of the Wilmorite Application, including a decision-making process with Wilmorite, for over two years before it formally initiated the statutorily mandated 120 day decision making period. The STC excluded West Farms from participation in the review process.

15. On January 17, 1990, West Farms submitted comments regarding the Wilmorite Application. Because of the absence of regulations governing the procedure for the submission of information by an intervenor to the STC, West Farms was unable to ascertain the nature or status of the STC's review of Wilmorite's application and to address the subject of the STC review. As a consequence, West Farms was chastised by the STC chairperson for providing an irrelevant and untimely submission.

16. On August 23, 1991, the STC issued a written notice of its intention to meet on September 5, 1991 to consider the Wilmorite Application. Such notice failed to describe the nature of the September 5, 1991 proceeding, the information that would be considered by the STC at its September 5, 1991 proceeding, the availability of such information to intervenors, such as West Farms, and to members of the public, and the nature of the action that the STC was considering taking on the Wilmorite Application.

17. West Farms was unable to prepare adequately for the September 5, 1991 proceeding on the Wilmorite Application because of the lack of adequate notice. West Farms requested that the STC postpone the September 5, 1990 proceeding. West Farms' request was denied.

18. On August 28, 1991, the Office of Traffic Engineer, Bureau of Highways of the State of Connecticut, prepared a "Traffic Investigation Report to the State Traffic Commission, recommending the granting of a traffic certificate to Wilmorite for the proposed plan for the Plainville Mall ("the Traffic Report"). The Traffic Report recommended that the traffic certificate granted to

Wilmorite be conditioned on Wilmorite's compliance with 17 conditions including, but not limited to,

(a) Wilmorite obtain an encroachment permit from the State Department of Transportation ("DOT") (Condition #1). Wilmorite can only obtain such encroachment permit if the United States Department of Transportation's Federal Highway Administration ("FHWA") approves the changes proposed by Wilmorite to the Federal Highway pursuant to 23 U.S.C. § 111. The STC has no authority over the approval process of the DOT or the FHWA.

(b) Wilmorite obtain four design waivers from the DOT design waiver committee (Condition #5). These design waivers concern waivers of safety requirements for sight lines, the width and the distance between an exit ramp and a driveway for a neighboring shopping plaza. The Traffic Report noted that "the feasibility of constructing the proposed roadway improvements depends on obtaining these design waivers." The STC has no authority over the approval process of the DOT Design Waiver Committee.

(c) Wilmorite obtain approval from the DOT for breaks in non access line on Route 72 and Route 10. (Condition #6). The Traffic Report stated that "approval of these breaks in lines would be required to construct the [roadway] and "the recommended roadway improvements are essential to the safe operation of the mall." The STC has no authority over DOT's approval process for breaks-in-lines of state highways.

(d) Wilmorite receive approval from the DOT for a computer control coordination system to control

traffic signals on Route 372 from Route 10 to Crooked Street and Crooked Street from Route 372 to Woodward Avenue/White Oak Avenue (Condition #7). The STC has no control over the approval by DOT of computer control coordination systems.

19. The Traffic Report noted that the plan submitted by Wilmorite for roadway improvement "will need to undergo further review by DOT before construction plans are finalized."

20. The Traffic Report also included an analysis of the traffic volumes and traffic patterns that would be generated by the Plainville Mall. The information in the Traffic Report indicated that at the intersections of Washington Street and Route 72 and Routes 10 and 371, traffic generated by the Plainville Mall would cause conditions to deteriorate to Level E service, especially during "peak" hours for the operation of the Plainville Mall. Level E service is a condition which exceeds the capacity of a roadway to handle such traffic.

21. Subsequent to August 28, 1991 and continuing until September 3, 1990, Wilmorite submitted additional plans and information concerning the Wilmorite Application.

22. On September 5, 1991, the STC held a meeting to consider the Wilmorite Application. At the meeting, two staff members from the DOT testified, the Senior Vice President of Wilmorite Corporation and Wilmorite's traffic engineer presented testimony in support of the Wilmorite Application, and West Farms offered testimony about the adverse traffic safety impact of the Plainville Mall. However, the STC denied West Farms the opportunity to

present expert testimony about the environmental harm that would result from the Plainville Mall and the roadway improvements, including testimony about the noise and air pollution and degradation and destruction of wetlands that the Plainville Mall and the roadway changes would create.

23. At the conclusion of the September 15, 1991 meeting, the STC approved the issuance of traffic certificate No. 109-8903-01 to Wilmorite for the Plainville Mall with the conditions recommended in the Traffic Report. The STC issued no opinion, decision or explanation of its reasons for such approval.

D. Aggrievement

24. West Farms is statutorily aggrieved by the STC's granting of a Traffic Certificate to Wilmorite for the Plainville Mall. On January 11, 1990, the STC granted West Farms' verified petition to intervene in the proceedings regarding Wilmorite's application for a Traffic Certificate for the Plainville Mall.

25. West Farms holds two certificates from the STC with respect to the West Farms Mall. In July 1972, the STC granted West Farms a certificate, under Section 14-311, allowing West Farms to construct and operate the West Farms Mall. Another STC certificate was granted to West Farms for an expansion of the West Farms Mall in 1982. Under both certificates, West Farms remains subject to the STC's continuing jurisdiction, including, but not limited to, the STC's right to revoke the certificate or to implement additional controls at West Farms' expense.

26. As an STC certificate holder, West Farms is aggrieved by the STC's granting of a Traffic Certificate to

Wilmorite for the Plainville Mall because the benefits conferred by such certificate diminish the value of West Farms' certificates and may impose additional obligations under West Farms certificates.

27. West Farms Mall also employs approximately 2400 to 3800 people, many of whom live in the greater West Hartford Central Connecticut Region, including Plainville, and use I-84 and Route 72 (southwest of the West Farms Mall) to travel to work.

28. Approximately 13 million people patronize West Farms Mall yearly, many of whom live in the vicinity of the proposed Plainville Mall or otherwise require access to West Farms Mall by I-84, Route 72 and other local road ways. The proposed Plainville Mall is within the West Farm Mall trade area.

29. West Farms derives income from the rentals in the West Farms Mall. This rental income is effected by gross rental sales generated by each tenant of the West Farms Mall. Such gross sale are directly affected by the ease and safety of access to West Farms Mall by patrons and employees and by the thoroughness and environmental soundness of highway planning.

30. West Farms is aggrieved by the STC's granting of a Traffic Certificate to Wilmorite for the Plainville Mall because the construction and operation of the Plainville Mall and the roadway changes authorized by the STC will cause traffic congestion, noise pollution, air pollution, dangerous roadway conditions, disruption of existing traffic patterns and an enormous increase in vehicular traffic on or adjacent to I-84 and Route 72 and other local roadways which are proximate to the West Farms Mall. Such traffic

congestion, pollution and unsafe conditions will adversely affect the comfort, health and safety of West Farms, employees and the patrons of the West Farms Mall, which will in turn adversely affect the gross rental sales generated by West Farms Mall and the rental and other income of West Farms.

31. The STC's issuance of a traffic certificate to Wilmorite for the construction of the Plainville Mall was in violation of fundamental notions of due process; made pursuant to unlawful procedures; and contrary to statutory duty; in that:

(a) The absence of any procedural regulations for the review and determination of Applications for traffic certificates, such as the Wilmorite Application, including the lack of any rules governing the submission of information, notice of proceedings, right to access to information considered by the STC, rights to present evidence, right to subpoena evidence, rights to cross-examine witnesses, the transcription or recording of STC proceedings, and the form of the decision that is rendered on a traffic certificate applications, deprived West Farms of the opportunity to participate meaningfully in the STC proceedings on the Wilmorite Application and to insure that an adequate administrative record was compiled for judicial review and resulted in the issuance of a traffic certificate to Wilmorite in violation of the Connecticut Administrative Procedures Act, Conn. Gen. Stat. Sec. 4-167, 4-177, 4-178, and 4-179; and Conn. Gen. Stat. Sec. 14-311(e).

(b) The absence of any substantive standards for evaluating whether a development or shopping center will "imperil" the "public safety" under Conn. Gen. Stat. Sec.

14-311 resulted in the issuance of a traffic certificate in violation of Conn. Gen. Stat. Sec. 14-311.

(c) The STC's ex parte meetings, discussions, telephone communications and decision-making with Wilmorite and other supporters, to the exclusion of an intervenor, West Farms, resulted in the issuance of traffic certificate to Wilmorite in violation of Conn. Gen. Stat. Secs. 4-177 and 4-181.

32. In reaching its decision and granting the traffic certificate to Wilmorite, the STC acted arbitrarily, capriciously, in abuse of the discretion vested in that body by law, and clearly erroneously in view of the substantial evidence on the record as a whole, in that:

(a) The STC conditioned the issuance of the traffic certificate to Wilmorite for the Plainville Mall on the condition that Wilmorite obtain permits and approvals from agencies over which the STC has no control. Specifically, the STC required Wilmorite to obtain (i) an encroachment permit from DOT, which encroachment permit is dependent upon obtaining a permit from the FHWA; (ii) design waivers from DOT; (iii) approval from DOT for breaks in non-access lines; and (iv) approval from DOT for a computer controlled signalization system was an abuse of discretion. The STC acted arbitrarily and unlawfully in issuing Wilmorite a traffic certificate prior to Wilmorite obtaining all of the approvals from other agencies which are necessary for the lawful issuance of a traffic certificate to Wilmorite.

(b) The STC's decision that the Plainville Mall would not imperil the public safety under Conn. Gen. Stat. Sec. 14-311 was clearly erroneous and not supported by

substantial evidence in light of the uncontradicted evidence before the STC that: (i) Wilmorite had provided the STC only with preliminary drawings of the roadway changes that it intended to make to accommodate the additional traffic that the Plainville Mall will generate; (ii) the Traffic Report indicated that further review of Wilmorite's plans for roadway improvements was necessary; (iii) the Plainville Mall will generate traffic which will cause significant traffic safety problem at various intersections in the vicinity of the Plainville Mall and the adjacent roadways; (iv) the proposed roadway changes to accommodate the Plainville Mall did not comply with at last four DOT safety design standards and there was no evidence that the public safety would be protected if such design standards were waived; and (v) the STC confined its review to traffic rather than public safety.

WHEREFORE, West Farms prays for the following relief:

1. That the appeal be sustained;

2. That judgment be entered reversing the action of the STC;

3. That the plaintiff West Farms be awarded costs in this action; and

4. That the Court award such other and further relief as may be available under law.

Dated in New Haven this ___ day of October, 1991.

THE PLAINTIFF

RETURN DATE: Nov. 19, 1991	:	SUPERIOR COURT
WEST FARMS ASSOCIATES	:	JUDICIAL DISTRICT
VS.	:	OF HARTFORD/ NEW BRITAIN
CONNECTICUT STATE TRAFFIC COMMISSION	:	AT HARTFORD
and WILMORITE, INC.,	:	OCTOBER 15, 1991

RECOGNIZANCE WITH SURETY

You, Tony Ness, Corporate Vice President of the Taubman Company, the Managing Agent for West Farms Associates, a partnership owning property known as the West Farms Mall, located at the juncture of Route 71 (New Britain Avenue) and I-84 (Exit 40) on the boundary line between West Hartford, Connecticut and Farmington, Connecticut, as principal, and Maria M. Kowal, 55 Whitney Avenue, 6 Floor, New Haven, Connecticut 06510, a surety, acknowledge yourselves jointly and severally bound to the State Traffic Commission in recognizance of $250.00, that the principal shall prosecute to effect the appeal which it has taken against the State Traffic Commission to the Superior Court in and for the Judicial District of Hartford/New Britain at Hartford, Hartford, Connecticut on the Third Tuesday of November, 1991 and that the

principal shall comply with the orders and decrees of said Court and that the principal shall pay any costs for which judgment may be rendered against them.

PRINCIPAL
WEST FARMS ASSOCIATES
BY THE TAUBMAN COMPANY, INC.
MANAGING AGENT

By:_____

STATE OF MICHIGAN)
) ss:
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this day of October, 1991, by

_____

STATE OF CONNECTICUT)
) ss:
COUNTY OF NEW HAVEN)

The foregoing instrument was acknowledged before me this ____ day of October, 1991, by Maria Kowal, Surety.

_____

(3)

Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

No. 91-1390

In The

Supreme Court Of The United States

October Term, 1991

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, ET AL.,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

RICHARD BLUMENTHAL
ATTORNEY GENERAL

CORNELIUS F. TUOHY
Assistant Attorney General
55 Elm Street
Hartford, Connecticut 06106
Tel.: (203) 566-2257

KENNETH N. TEDFORD*
Assistant Attorney General

GEORGE E. FINLAYSON
Assistant Attorney General

Attorneys for Respondent

**Counsel of Record*

QUESTION PRESENTED

Whether review of this matter on certiorari is appropriate in view of the well settled law that the Connecticut Environmental Protection Act, Conn. Gen. Stat. §§ 22a-14-22a-20 did not confer an enforceable property right upon West Farms to sustain this action?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 2

STATEMENT OF THE RELEVANT FACTS 3

ARGUMENT: WEST FARMS' PETITION SHOULD BE DENIED 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **Page(s)**

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 7, 8

Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council, 215 Conn 474, 576 A.2d 510 (1990) 8

Connecticut Business and Industries Association, Inc. v. Commission on Hospitals and Health Care, 214 Conn. 726 (1990) 8

Connecticut Fund for the Environment v. Stamford, 192 Conn. 247 (1989) 7

Connecticut Water Co. v. Beausoleil, 204 Conn. 38 (1987) 7

Donaldson v. U.S., 400 U.S. 517 (1971) 6

Double I Limited Partnership v. Plan and Zoning Commission, 218 Conn. 65, 588 A.2d 624 (1991) 8

Fusco v. State of Connecticut, 815 F.2d 201 (2nd Cir.), *cert. denied* 484 U.S. 849 (1987) 9

Hewitt v. Helms, 459 U.S. 460 (1983) 8

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 6

Manchester Environmental Coalition v. Stockton, 184 Conn. 51, 441 A.2d 68 (1981) 8

Morrissay v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) 7

TABLE OF AUTHORITIES (continued)

CASES **Page(s)**

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1954) 6

West Farms Associates v. State Traffic Commission of the State of Connecticut, 951 F.2d 469 (2nd. Cir. 1991) 3

Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54 (2nd Cir. 1985) 9

Statutes, Regulations and Rules

Conn. Gen. Stat. § 14-298 4

Conn. Gen. Stat. § 14-311 . . . . . *passim*

Conn. Gen. Stat. § 22a-14 4

Conn. Gen. Stat. § 22a-19 . . . . . *passim*

No. 91-1390

In The

Supreme Court Of The United States

October Term, 1991

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, ET AL.,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

West Farms Associates ("West Farms"), filed this action against the Connecticut State Traffic Commission (STC); J. William Burns, Commissioner of the Connecticut Department of Transportation; Bernard R. Sullivan, Commissioner of the Connecticut Department of Public Safety; Lawrence F. DelPonte, Commissioner of the Connecticut Department of Motor Vehicles; the Connecticut Department of Transportation (ConnDOT) ("State Defendants")[1]; and Wilmorite, Inc. ("Wilmorite") seeking declaratory and injunctive relief with respect to the manner in which the STC is processing Wilmorite's application for a certificate of operation under Section 14-311 of the Connecticut General Statutes. West Farms sought to stop the STC from conducting an administrative review of Wilmorite's application. In the Amended Complaint, West Farms alleged that:

1. The STC did not have any rules or regulations regarding the review and approval of Section 14-311 applications. West Farms also claimed a "property interest" in the Connecticut administrative proceedings at issue and argued that it was deprived of this property right without due process of law in contravention of the Fourteenth Amendment to the United States Constitution and 42 U. S. C. § 1983.

2. Meetings and other correspondence between STC staff and Wilmorite representatives prior to the hearing stage,

---

[1] Since the initiation of this action, the Commissioner of the Connecticut Department of Transportation, Commissioner of the Connecticut Department of Public Safety, and Commissioner of the Connecticut Department of Motor Vehicles have been replaced. Therefore, on May 22, 1991, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, J. William Burns, Bernard R. Sullivan and Lawrence F. DelPonte were substituted as parties to the action by order of the District Court. The new parties are Emil H. Frankel, Commissioner of the Connecticut Department of Transportation, Nicholas A. Cioffi, Commissioner of the Connecticut Department of Public Safety, and Louis S. Goldberg, Commissioner of the Connecticut Department of Motor Vehicles.

without prior notice to and an opportunity for West Farms to directly participate, constituted prohibited "*ex parte*" communications that denied West Farms due process and equal protection of the law in violation of the Fourteenth Amendment and also denied West Farms the "right to petition" the government in violation of the First Amendment.

Both the State Defendants and Wilmorite moved to dismiss the lawsuit. The District Court dismissed the action on the grounds that West Farms failed to allege a property interest sufficient to sustain its due process and equal protection claims, and that West Farms failed to allege a claim of any violation of its "right to petition."

Thereafter, West Farms filed a notice of appeal to the United States Court of Appeals for the Second Circuit. On December 3, 1991, the Court of Appeals upheld the District Court's decision dismissing the lawsuit and held that the Connecticut Environmental Protection Act did not confer a property right upon West Farms and West Farms was not deprived of any First Amendment rights. *West Farms Associates v. State Traffic Commission of the State of Connecticut*, 951 F.2d 469 (2nd Cir. 1991).

West Farms has filed a petition for a writ of certiorari and the State Defendants now present this opposition to the granting of such writ.

STATEMENT OF THE RELEVANT FACTS

The essential facts of this case are not in dispute. This case involves a dispute over the administrative review being conducted by the STC regarding an application that Wilmorite filed under Section 14-311 of the Connecticut General Statutes seeking a certificate of operation for a proposed shop-

ping center to be constructed in the Town of Plainville, Connecticut.[2]

The STC is an administrative agency of the State of Connecticut which consists of three state commissioners and an administrative staff. Conn. Gen. Stat. § 14-298. The STC is responsible for processing applications for certificates of operation from major traffic generators. The primary function of the STC is to ensure that the operation of a major traffic generator will not adversely impact public safety. Conn. Gen. Stat. § 14-311.

On March 28, 1989, Wilmorite submitted an application for certificate regarding the proposed construction and operation of a shopping center in the Town of Plainville (i.e., "Plainville Mall"). In response to Wilmorite's application, there had been several informal meetings and discussions between STC staff, ConnDOT staff and Wilmorite as part of an administrative investigation of the application and the impact of the mall on the state highways.

On December 1, 1989, West Farms filed a notice of intervention and petition to be designated a party pursuant to Conn. Gen. Stat. § 22a-14 *et seq.* which permits "any person, partnership, corporation . . . or other legal entity" to intervene in any administrative proceeding in order to raise environmental impact issues. Conn. Gen. Stat. § 22a-19. Intervention for § 22a-14 purposes was granted at a public meeting of the STC Commissioners on December 19, 1989. In addition to intervention for environmental purposes, West Farms was allowed to participate in any meeting of the STC Commissioners

---

[2] Section 14-311(a) provides: No person, firm, corporation, state agency, or municipal agency or combination thereof shall build, expand, establish or operate any open air theater, shopping center or other development generating large volumes of traffic, having an exit or entrance on, or abutting or adjoining, any state highway or substantially affecting state highway traffic within this state until such person or agency has procured from the state traffic commission a certificate that the operation thereof will not imperil the safety of the public.

regarding Wilmorite's application, to receive notice of all related STC matters, and to present related information for the STC and ConnDOT staffs' consideration.

While the administrative process was continuing, and before any public meeting or decision on Wilmorite's application occurred, West Farms instituted this federal action. West Farms owns a shopping center located approximately 6 miles from the proposed Plainville Mall and would be in direct commercial competition with the Plainville Mall.

In the instant lawsuit, West Farms claimed a property interest in the Wilmorite review, analysis and investigation stage of the proceedings at the STC staff level. West Farms has characterized informal discussions between STC staff and Wilmorite as "*ex parte*" and claimed a right to be part of all such discussions. This claim was advanced despite the fact that the application was only in the stage of preliminary review by STC staff and had not been presented to the STC Commissioners for their review and decision. In addition, as a result of this claimed property interest, West Farms also alleged a denial of due process stemming from the STC's lack of state regulations.

On September 5, 1991, the STC held a special public meeting to consider Wilmorite's application for an STC traffic certificate. All interested persons were in attendance, including West Farms, and all were offered the opportunity to address the STC. At the conclusion of the meeting, the STC voted to grant a traffic certificate to Wilmorite for the operation of the proposed Plainville Mall.

ARGUMENT:

WEST FARMS PETITION SHOULD BE DENIED

West Farms has failed to carry its burden of demonstrating that the issues on appeal meet the test for review. Pursuant to Rule 10, Supreme Court review of a matter "will be granted only when there are special and important reasons therefor." In determining the question of review the court will examine the issues presented to determine if they raise questions of constitutional dimension, or novel questions relating to the interplay between state and federal law, or if there is a conflict among the circuit courts. *See, Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 73-74 (1954); *Kossick v. United Fruit Co.,* 365 U.S. 731, 733 (1961); *Donaldson v. U.S.,* 400 U.S. 517, 522 (1971). When the issues presented fail to satisfy the mandate specified by Rule 10, certiorari has been denied. Here the issues presented by West Farms do not come within the ambit of Rule 10 and, therefore, the court should not grant its petition for certiorari.

West Farms raises several issues, all which are aimed at extracting a property right from Section 22a-19. West Farms raises the following issues:

1) Whether the right of an individual to file an administrative appeal under Section 22a-19 creates a property right;

2) Whether Connecticut law confers a property right upon West Farms under Section 22a-19;

3) Whether Section 22a-19 creates mandatory or procedural rights;

4) Whether Section 22a-19 confers a universal right shared by all citizens of the State of Connecticut or whether it confers a mandatory individual benefit for West Farms; and

5) Whether Section 22a-19 creates property rights enforceable through the "public trust doctrine."

To all of these issues, the answer is that Section 22a-19 does not confer any enforceable property right upon West Farms and West Farms has failed to demonstrate any authority to show otherwise. Further, none of the issues rise to the level of special or important to merit Supreme Court review under the standards established in Rule 10.

It is clear that West Farms recognizes the essence of clearly demonstrating a property right to sustain this lawsuit. *Morrissay v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Over the course of this lawsuit, West Farms has advanced a wide variety of claims to establish such a right with no success, and now has seized Section 22a-19 for their final stand. However creative West Farms advocacy of such issues, they have failed to establish any such property rights and have failed to satisfy the Rule 10 requirements.

As the Second Circuit correctly held, the language of Section 22a-19 is not mandatory, but rather, establishes certain procedural rights to allow intervenors the opportunity to be heard. In this regard, a person "*may*" intervene in an administrative proceeding to raise environmental issues within the agency's jurisdiction. *Connecticut Water Co. v. Beausoleil*, 204 Conn. 38, 45 (1987); *Connecticut Fund for the Environment v. Stamford*, 192 Conn. 247, 250 (1989). Further, once environmental issues are raised, the agency need only "*consider*" the information presented. Thereafter, the agency is free to act within its discretion and judgment in the consideration of such information.

Nothing in the statute confers individual mandatory benefits, but rather, allows individuals to proceed for the benefit of the general public as it is the public at-large who are the beneficiaries of the statute. Because the statute does not

create individual rights, no enforceable property rights are created under Connectcut law. *Connecticut Business and Industries Association, Inc. v. Commission on Hospitals and Health Care*, 214 Conn. 726 (1990).

West Farms primary reliance on *Hewitt v. Helms*, 459 U.S. 460 (1983) is inapposite and demonstrates the weakness of its arguments. Both the Second Circuit and District Court recognized the obvious differences between this lawsuit and *Hewitt*. In *Hewitt*, the Supreme Court found that a liberty interest was created by a statute which guaranteed no prisoner would be subjected to administrative segregation without a hearing. It was due to the express mandatory language of the statute that the rights were created. Section 22a-19's non-mandatory language and procedural guidelines bear no similarity to the statute in *Hewitt*. It is like comparing "apples and oranges".

In finding a property right, the courts must look to state law. *Board of Regents v. Roth, supra* at 408 U.S. 577. In Connecticut no such property rights have been created. In fact, in *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council*, 215 Conn. 474, 478 n.5, 576 A.2d 510 (1990), the Connecticut Supreme Court noted that it has not yet decided the issue of whether Section 22a-19 creates a property right. Further, in *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 441 A.2d 68 (1981) cited by West Farms, no property rights were created or discussed, but rather in discussing procedural rights under Section 22a-19, the court made a vague reference to "substantive and procedural" rights, but did not elaborate or expand upon this statement. Finally, although Section 22a-19 was not at issue in *Double I Limited Partnership v. Plan and Zoning Commission*, 218 Conn. 65, 588 A.2d 624 (1991), the court found no property rights available to plaintiff under Connecticut law in circumstances substantially similar to this case. Hence, West Farms can point to no clear property right under Connecticut law.

Here, there is ample support for the proposition that section 22a-19 may create procedural rights while there is nothing to support any property rights. In examining the factors of whether to grant the writ, none exists here. First West Farms points to no conflict among the circuits. Second, there is no claim that either the Second Circuit or the District Court have departed from the accepted and usual course of judicial proceedings. Finally, there is nothing to support that the Second Circuit decided any federal question in conflict with the Connecticut Supreme Court. To the contrary, the Second Circuit's decision was in complete compliance with both state and federal law.[3] *See, Fusco v. State of Connecticut*, 815 F.2d 201 (2nd Cir.), *cert. denied* 484 U.S. 849 (1987); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2nd Cir. 1985).

[3] West Farms attempted to raise the "public interest doctrine" as creating a property right. However, this is nothing more than a different approach to fabricate a property right from section 22a-19. As has already been stated section 22a-19 creates no such rights and, therefore, offers nothing to support the granting of this writ.

CONCLUSION

West Farms petition for writ of certiorari fails to demonstrate that this matter raises any important or special issues or in any way meets the considerations listed in Rule 10. Therefore, the petition should be denied.

DEFENDANT
STATE OF CONNECTICUT
TRAFFIC COMMISSION

RICHARD BLUMENTHAL
ATTORNEY GENERAL

CORNELIUS F. TUOHY
Assistant Attorney General

By: KENNETH N. TEDFORD
Assistant Attorney General
Juris No. 85350
ITS ATTORNEY
55 Elm Street
Hartford, Connecticut 06106
Tel.: 566-2257

By: GEORGE E. FINLAYSON
Assistant Attorney General
Juris No. 85166
ITS ATTORNEY
55 Elm Street
Hartford, Connecticut 06106
Tel.: 566-2257

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

(4)

No. 91-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

REPLY OF PETITIONER

NEIL T. PROTO*
JAMES F. HIBEY
FRANCES C. DELAURENTIS
ERIC T. WERNER
MARIE L. MILLER
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHTD.
901 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

**Counsel of Record*
Attorneys for Petitioner
West Farms Associates

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. *The STC's September 5, 1991 Meeting Was Part of the Record Before the Court of Appeals and the Minutes of that Meeting Identify No Evidence to Rebut West Farms'* Prima Facie *Showing of Environmental Harm*	2
II. *The Mandatory Duty of Section 22a-19 of CEPA Is Within The Jurisdiction of the STC*	3
III. *West Farms' State Court Action Will Not Remedy the Federal Constitutional Defects in the STC's Disposition of Wilmorite's Certificate Application*	4
IV. *The Public Trust Doctrine Is Properly Before This Court*	5
CONCLUSION	7
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Black v. Cutter Laboratories, 351 U.S. 298 (1956) 7

Connecticut Fund for the Environment, Inc. v. Stamford, 192 Conn. 247, 470 A.2d 1214 (1984) 4

Connecticut Water Co. v. Beausoleil, 204 Conn. 38, 526 A.2d 1329 (1984) 3,4

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) 7

Hewitt v. Helms, 459 U.S. 460 (1983) 6

Hyatt v. Sullivan, 899 F.2d 329 (4th Cir. 1990) ... 7

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) 7

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 6

Manchester Environmental Coalition v. Stockton, 184 Conn. 51, 441 A.2d 68 (1981) 7

Middletown v. Hartford Electric Light Co., 192 Conn. 591, 473 A.2d 787 (1984) 3,4

Red Hill Coalition v. Town Plan and Zoning Commission, 212 Conn. 727, 563 A.2d 1347 (1989) 7

Vance v. Terrazas, 444 U.S. 252 (1980) 7

West Farms Associates v. State Traffic Commission, No. 91-7460 (2nd Cir. Dec. 3, 1991) 6

Statutes:

Connecticut Environmental Protection Act, CONN. GEN. STAT. ANN. §§ 22a-14—22a-20 (West 1985)

CONN. GEN. STAT. ANN. § 22a-15 6,7

CONN. GEN. STAT. ANN. § 22a-16 6

CONN. GEN. STAT. ANN. § 22a-17(a) 6

Table of Authorities Continued

	Page
CONN. GEN. STAT. ANN. § 22a-18	6
CONN. GEN. STAT. ANN. § 22a-18(a)	6
CONN. GEN. STAT. ANN. § 22a-18(b)	6
CONN. GEN. STAT. ANN. § 22a-18(c)	6
CONN. GEN. STAT. ANN. § 22a-19	4,6
CONN. GEN. STAT. ANN. § 22a-19(a)	6
CONN. GEN. STAT. ANN. § 22a-19(b)	6,7
CONN. GEN. STAT. ANN. § 22a-19a	6
Connecticut Administrative Procedures Act, CONN. GEN. STAT. §§ 4-167, 4-177, 4-178, and 4-179	5
Miscellaneous:	
Affidavit of Neil T. Proto Setting Forth Supplemental Authorities Since Submission of Briefs	2
Brief of Wilmorite, Inc. in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit	*passim*
Minutes Special Meeting, State Traffic Commission, September 5, 1991	3
Petition for Writ of Certiorari	2,6
Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1390

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

PETITIONER'S REPLY TO RESPONDENT WILMORITE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 15.6 of the Supreme Court Rules, SUP. CT. R. 15.6, Petitioner West Farms Associates hereby respectfully replies to Respondent Wilmorite, Inc.'s Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("*Brief in Opposition*"). Wilmorite's Brief in Opposition (1) misrepresents the full extent of the record in this case; (2) urges an incorrect interpretation of the STC's obligations under CEPA; (3) challenges the jurisdiction of the Supreme Court while contending that West Farms has no right of appeal to the state court; and (4) seeks to limit this Court to a purely superficial examination of the court of appeals' opinion. The Brief in Opposition at-

tempts to obscure the facts that have led West Farms to seek its remedy of last resort from this Court.

I. *The STC's September 5, 1991 Meeting Was Part of the Record Before the Court of Appeals and the Minutes of that Meeting Identify No Evidence to Rebut West Farms'* Prima Facie *Showing of Environmental Harm*

Contrary to Wilmorite's contention, *Brief in Opposition* at 3-4, the events of the September 5, 1991 meeting of the STC were made part of the record before the court below. On September 18, 1991, West Farms' counsel transmitted to the court of appeals for filing an affidavit supplementing its authorities and notifying the court of the meeting, the approval of Wilmorite's Certificate application, and the STC's refusal to receive testimony or evidence with respect to West Farms' environmental concerns. Affidavit of Neil T. Proto Setting Forth Supplemental Authorities Since Submission of Briefs, September 18, 1991, App.. *infra,* at 1a.

West Farms formally requested from the STC a copy of its official minutes of its September 5, 1991 meeting ("Minutes"). As the transmittal letter reveals, Respondent STC did not send those Minutes to West Farms until September 23, 1991—almost three weeks after the meeting and only one day prior to the scheduled oral argument.

The minutes of the STC's formal meetings constitute the official record of actions taken by that agency. *Petition for Writ of Certiorari* at 45a ("*Petition*"). Thus, the Minutes provide the only record of the STC's decision making process with respect to the consideration and disposition of

Wilmorite's Certificate application.[1] In West Farms' view, this record was necessary to proper analysis of the agency's conduct under the Connecticut Environmental Protection Act, CONN. GEN. STAT. ANN. §§ 22a-14—22a-20 (West 1985) ("CEPA"). Accordingly, West Farms perfected the record for appeal as effectively as possible under the circumstances. In view of Respondent STC's failure timely to make a record of the proceedings available prior to oral argument, the respondents should not now be heard to complain about the facts in the record.

II. *The Mandatory Duty of Section 22a-19 of CEPA Is Within The Jurisdiction of the STC*

Citing *Connecticut Water Co. v. Beausoleil,* 204 Conn. 38, 526 A.2d 1329 (1984), Wilmorite asserts that West Farms' environmental allegations are outside the scope of STC jurisdiction. *Brief in Opposition* at 10-12. These arguments are flatly inconsistent with the text of Section 22a-19 and the entire statutory scheme of CEPA. They also misinterpret the cases on this point.

Specifically, Wilmorite can draw no comfort from *Middletown v. Hartford Electric Light Co.,* 192 Conn. 591, 473 A.2d 787 (1984), and *Connecticut Fund for*

---

[1] Wilmorite's claim that the record contained "significant and substantial" evidence rebutting West Farms' allegations is without merit. The Minutes make absolutely no reference to any of Wilmorite's asserted environmental evidence that might rebut West Farms' claims. In fact, the record provides no indication that the agency considered any environmental evidence at all in reaching its decision. *See Minutes Special Meeting, State Traffic Commission,* September 5, 1991, *reprinted in, Petition for Writ of Certiorari* at 48a-49a (remarks of Commissioners Frankel and Cioffi).

the Environment, Inc. v. Stamford, 192 Conn. 247, 470 A.2d 1214 (1984). In *Beausoleil,* a later case, the Connecticut Supreme Court explained that

> [i]n *Middletown v. Hartford Electric Light Co.* . . . and *Connecticut Fund for the Environment, Inc. v. Stamford,* . . . we recognized that General Statutes § 22a-19 does *not* expand the jurisdictional authority of an administrative body acting pursuant to a separate act of title 22a, but rather, limits an intervenor to the raising of those environmental matters which impact on the particular subject of the act pursuant to which the commissioner is acting.

Beausoleil, 204 Conn. at 46, 526 A.2d at 1334 (emphasis added, citations omitted). Thus, the jurisdictional limitation urged by Wilmorite clearly applies only to agencies (like the inland-wetland agency in *Middletown* and the Stamford Environmental Protection Board in *Connecticut Fund for the Environment*) created under Connecticut's environmental statutes and assigned specific environmental responsibilities by those statutes. As Wilmorite concedes, the STC is not a creature of Title 22a of the Connecticut General Statutes. Accordingly, it is subject to the mandatory duty imposed by Section 22a-19. CONN. GEN. STAT. ANN. § 22a-19 (West 1985).

III. *West Farms' State Court Action Will Not Remedy the Federal Constitutional Defects in the STC's Disposition of Wilmorite's Certificate Application*

Wilmorite's contention that "alternative state court procedures are available to West Farms," and that this Court should take judicial notice of West Farms'

state court appeal of the STC's grant of the disputed Certificate, *Brief in Opposition* at 13, is both disingenuous and hypocritical in view of its later contention that Section 22a-19 does not provide a right to appeal from actions of the STC. *Id.* at 16-17. Thus, its argument is that no judicial forum exists. Wilmorite urges this Court to deny West Farms a remedy in deference to a purported state remedy which Wilmorite simultaneously contends is unavailable.

Moreover, despite Wilmorite's claim to the contrary, West Farms' state court Appeal From Final Decision is based only upon violations of state law—specifically, the Connecticut Administrative Procedures Act, CONN. GEN. STAT. §§ 4-167, 4-177, 4-178, and 4-179 and other statutes. It does not raise the federal constitutional question now before this Court. The term "due process," in the broad sense that it is used in the state appeal, does not carry talismanic force to bring before the Connecticut court a federal claim nowhere referenced in the pleading.

Stripped of its verbiage, Wilmorite is arguing for some form of abstention. Neither court below accepted this argument. Should the Court find Wilmorite's argument in this regard persuasive, the appropriate course would be to hold disposition on the Petition pending decision by the state court in order to determine that the Federal constitutional defect, although not explicitly raised, has been properly resolved.

IV. *The Public Trust Doctrine Is Properly Before This Court*

Finally, Wilmorite asserts that West Farms did not raise before the court of appeals the effect of the

Public Trust Doctrine on the proper interpretation of Section 22a-19. *Brief in Opposition* at 15. Wilmorite further avers that the Doctrine has no application here because certain of its terms are not clearly defined. *Id.* at 16.

First, throughout this proceeding, West Farms has asserted rights based, *inter alia,* on the mandatory language of Section 22a-19 of CEPA. CEPA is explicitly based on the Public Trust Doctrine. Its text, purpose and history clearly so provide. *See* CONN. GEN. STAT. ANN. §§ 22a-15, 22a-16, 22a-17(a), 22a-18, 22a-18(a), 22a-18(b), 22a-18(c), 22a-19, 22a-19(a), 22a-19(b), and 22a-19a. Analysis of West Farms' claim required the court below to evaluate the statute and its purpose against the standards articulated by this Court in *Hewitt v. Helms,* 459 U.S. 460 (1983) and its companion cases. It did so; and, in the process, resolved a critical issue (*i.e.,* who benefits from CEPA's enforcement) based on its understanding of the Public Trust Doctrine. It concluded, incorrectly, that CEPA's beneficiaries are the public generally, which precludes any individualized entitlement, *cf. Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), such as West Farms'. *West Farms Associates v. State Traffic Comm'n,* No. 91-7460 (2nd Cir. Dec. 3, 1991), *reprinted in, Petition* at 6a. In view of these facts, it is difficult to imagine how any court reading the statute even casually could overlook such a central doctrine. The court of appeals certainly did not.[2]

---

[2] Wilmorite's suggestion that the terms "public trust" and "other natural resources" have not been defined or interpreted is plainly wrong. The Public Trust Doctrine has a rich history in this Court's cases and in legal scholarship that provides relevant standards for determining the contours of the phrase

Second, even assuming, *arguendo,* the issue was not raised below, this Court has stated repeatedly that it reviews judgments, not opinions. *Fed. Communications Comm'n v. Pacifica Found.,* 438 U.S. 726 (1978); *Black v. Cutter Laboratories,* 351 U.S. 298 (1956); *accord Hyatt v. Sullivan,* 899 F.2d 329 (4th Cir. 1990); *see also Vance v. Terrazas,* 444 U.S. 252, 258 n.5 (1980) and cases cited therein. Accordingly, in formulating its analysis in any particular case, the Court is free to consider rationales only implicitly considered or employed by the court of appeals.

CONCLUSION

For the foregoing reasons, Respondent Wilmorite's arguments in opposition to the Petition are without merit. Accordingly, the writ of certiorari should be granted.

"public trust." *See Illinois Cent. R.R. v. Illinois,* 146 U.S. 387 (1892); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970). Likewise, the Connecticut Supreme Court has articulated an analysis giving meaning to the phrase "other natural resources." *See Red Hill Coalition v. Town Plan and Zoning Comm'n,* 212 Conn. 727, 563 A.2d 1347 (1989). Moreover, CEPA also declares "that there is a public trust in the air," a resource of unambiguous character. CONN. GEN. STAT. ANN. § 22a-15; *cf.* § 22a-19(b); *see also Manchester Envtl. Coalition v. Stockton,* 184 Conn. 51, 441 A.2d 68 (1981) (recognizing air pollution, like that alleged by West Farms, as an injury to the public trust in air).

Respectfully submitted,

NEIL T. PROTO
JAMES F. HIBEY
FRANCES C. DELAURENTIS
ERIC T. WERNER
MARIE L. MILLER
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHTD.
901 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

APRIL 10, 1992 *Counsel for West Farms Associates*

APPENDIX

VERNER, LIIPFERT, BERNHARD, McPHERSON AND HAND
CHARTERED
Suite 700
901-15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6000

September 18, 1991

VIA FEDERAL EXPRESS

Elaine B. Goldsmith
Office of the Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
40 Foley Square
New York, NY 10007

Re: West Farms Associates, Plaintiff-Appellant v. State Traffic Commission, et al., Defendants-Appellees, Case No. 91-7460

Dear Ms. Goldsmith:

Enclosed please find for filing the original and nine copies of the Affidavit of Neil T. Proto Setting Forth Supplemental Authorities Since Submission Of Briefs pursuant to Rule 28j of the Federal Rules of Appellate Procedure.

If you have any questions, please do not hesitate to call.

Thank you for your assistance in this matter.

Sincerely,

/s/ Neil T. Proto
Neil T. Proto

Enclosures

91-7460

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WEST FARMS ASSOCIATES,
Plaintiff-Appellant,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, EMIL H. FRANKEL AND J. WILLIAM BURNS, INDIVIDUALLY AND AS A MEMBER OF THE STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, NICHOLAS A. CIOFFI AND BERNARD R. SULLIVAN, INDIVIDUALLY AND AS A MEMBER OF THE STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, LOUIS S. GOLDBERG AND LAWRENCE F. DELPONTE, INDIVIDUALLY AND AS A MEMBER OF THE STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, DEPARTMENT OF TRANSPORTATION OF THE STATE OF CONNECTICUT, AND WILMORITE, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

AFFIDAVIT OF NEIL T. PROTO SETTING FORTH SUPPLEMENTAL AUTHORITIES SINCE SUBMISSION OF BRIEFS

NEIL T. PROTO
JAMES F. HIBEY
FRANCES C. DELAURENTIS
MICHAEL H. TECKLENBURG
Verner, Liipfert, Bernhard
McPherson and Hand
901 15th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 371-6000
Counsel for West Farms Associates

91-7460

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 91-7460

WEST FARMS ASSOCIATES,
Plaintiff-Appellant,

v.

STATE TRAFFIC COMMISSION, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

AFFIDAVIT OF NEIL T. PROTO SETTING FORTH SUPPLEMENTAL AUTHORITIES SINCE SUBMISSION OF BRIEFS

I, Neil T. Proto, being duly sworn, do on oath depose and say:

1. I am the attorney of record representing West Farms Associates, Plaintiff-Appellant in the above-entitled matter, and a member of the bar of this Court. I am submitting this Affidavit setting forth supplemental authorities pursuant to F.R.A.P. 28(j).

2. Briefs on the merits of this matter were completed on August 6, 1991 and oral argument has been set for September 24, 1991.

3. West Farms stated in its Opening and Reply Briefs that (i) the STC does not hold a "hearing"; it holds a "meeting" (Opening Br. 17, 25; Reply Br. 4, n.3); and (ii)

the Attorney General's Office takes the position that because such STC meetings are not hearings, there is no right to appeal under Conn. Gen. Stat. Section 4-183 or any other state statute (Opening Br. 8-9; Reply Br. 21, n.12).

4. On January 6, 1991, in an unreported opinion, the Superior Court in Connecticut rendered a decision in *Town of Southington v. State Traffic Commission*, 1991 Conn. Super LEXIS 102 (1991), wherein it held, among other things, that unless a formal hearing is held, there is no right to appeal a decision of the State Traffic Commission (STC) under Conn. Gen. Stat. Section 4-183. Counsel for West Farms only recently became aware of the significance of this decision following the submission in this case of the Affidavit of Attorney George Finlayson described below.

5. In his Affidavit of August 29, 1991 to this Court, Assistant Attorney General George Finlayson, who represents the State Defendants in the above-entitled matter, stated that:

> Any final decision of the Connecticut State Traffic Commission may be appealed to the Superior Court by an aggrieved person pursuant to Conn. Gen. Stat. 14-311(e) and Conn. Gen. Stat. 4-183.

6. The District Court below stated that the STC would hold a hearing on West Farms' environmental concerns (Opening Br. 25). On September 5, 1991, the STC met and granted Wilmorite's Application for a Traffic Certificate. When asked at that proceeding by the undersigned, the STC Chairman, Commissioner Emil Frankel, stated that the STC was holding a meeting and not a hearing. West Farms was not allowed to submit information or testimony on its environmental concerns at the STC meeting.

7. The foregoing is true to the best of my knowledge and belief.

Dated this 18th day of September, 1991.

/s/ Neil T. Proto
Neil T. Proto
Counsel for West Farms Associates

Sworn and subscribed to before me this 18th day of September, 1991.

/s/Beverly A. Taylor
Notary Public

My Commission Expires:
February 14, 1992